

HOW FLAWED IS
OUR CONSTITUTION?

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TOM DELAY'S
MYSTERIOUS \$150,000

JOHN B. JUDIS

+ WYNTON MARSALIS ON FINDING STRENGTH IN NEW ORLEANS

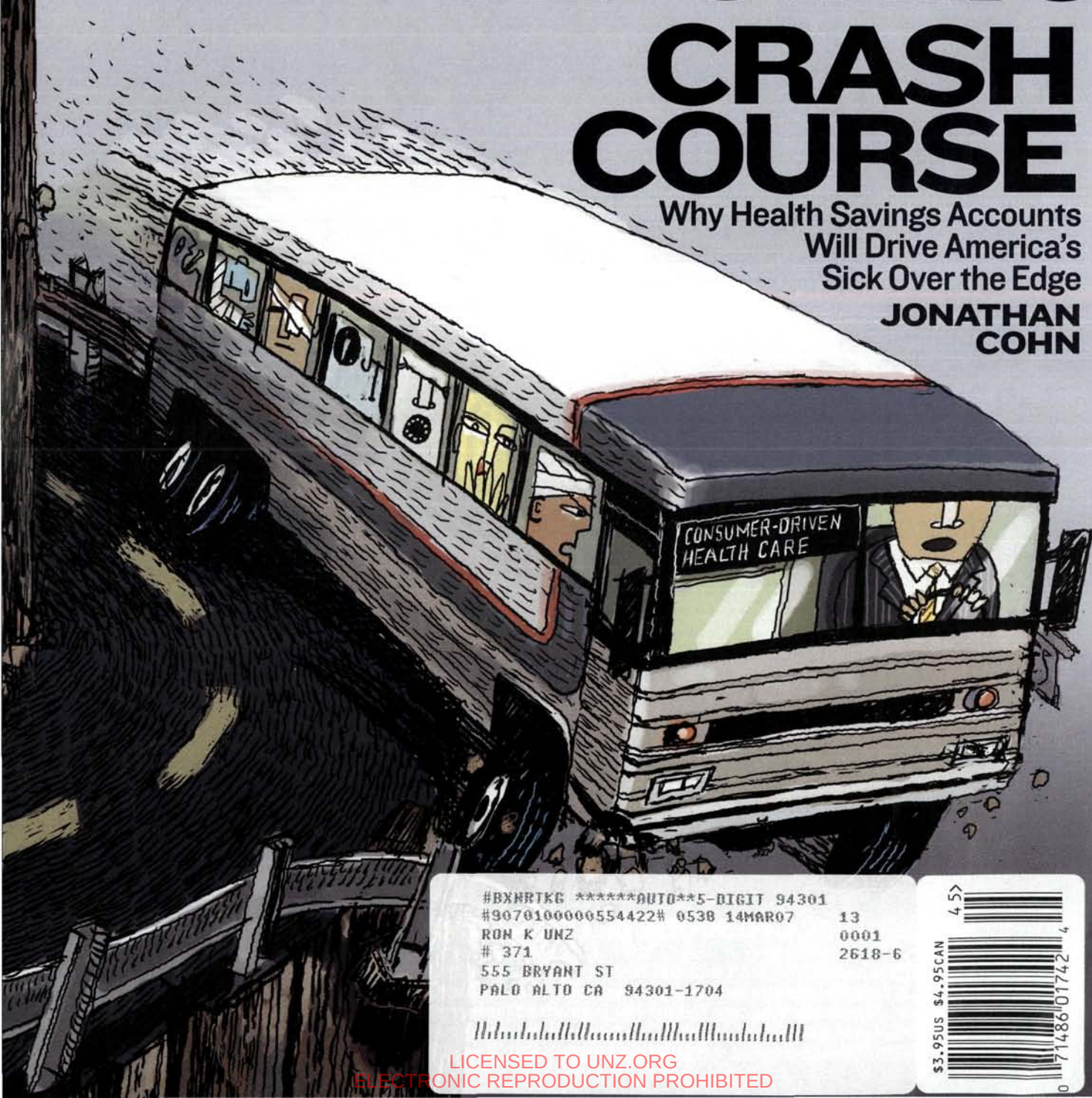
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THE NEW REPUBLIC

CRASH COURSE

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Will Drive America's
Sick Over the Edge

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COHN**



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THE NEW REPUBLIC

A JOURNAL OF POLITICS AND THE ARTS

NOVEMBER 7, 2005 WASHINGTON, D.C. ISSUE 4,738 VOLUME 233

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CORRESPONDENCE

SCHOOL OF THOUGHT

I AM WARY OF FRANKLIN FOER'S suggestion that Democrats should adopt the methods of College Republicans ("Swimming with Sharks," October 3). What he describes is a totally amoral, cannibalistic struggle for power and self-aggrandizement. Granted, this gives the GOP an advantage in political infighting. But it also renders them incapable of improving society. The Bolsheviks showed that the ruthless acquisition and exercise of power is not the way to a better world.

STEFAN PATEJAK
Washington, D.C.

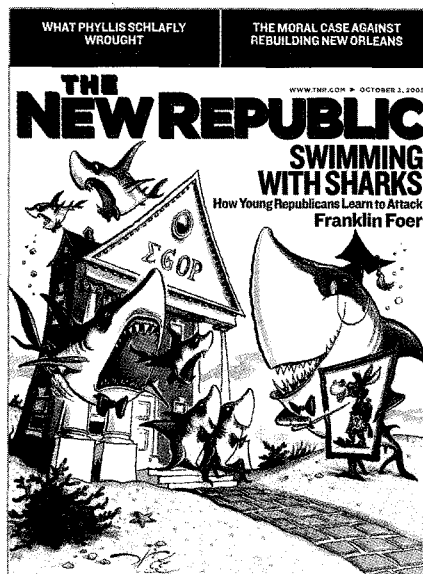
FOER'S ARTICLE WAS A BIT OF UNpleasant déjà vu for me. As a member of the California College Republicans in the mid-'90's, I found that the aim was not so much to win—or even to defeat your opponent. It was to destroy your opponent and to humiliate him. The funny thing was that the enemy was usually fellow Republicans. In the College Republicans, you have up-and-coming Christian conservatives and people who believe in the importance of moral character. Among them, there are those oddly willing to do *anything* for the cause. Ten years later, I cannot say that the dirty tricks had anything to do with ideology, conservatism, or even patriotism. It was always about power: *Lord of the Flies* writ large.

When we entered politics, it was with the naïve notion that we could somehow do better. But what I discovered instead is that Richard Nixon and the rest of the Committee to Re-elect the President are alive and well and will probably be walking the halls at the next College Republicans convention.

DARREN BOUWMEESTER
Rockville, Maryland

PREPARATION H5N1

WENDY ORENT SUGGESTS WE needn't worry about the next influenza pandemic, but her argument is no more than a dangerous case of hope mixed with ideology, masquerading as scientific fact ("Chicken Little," September 12). Flu pandemics occur every few decades. It has been 37 years since the last pandemic, and the H5N1 bird flu



virus has an unprecedented combination of traits that make it a prime candidate for causing the next one: It is broadly dispersed across Asia, it is highly pathogenic in humans and some birds, and it is highly prevalent in birds. No responsible scientist has predicted with certainty that the next pandemic will be as bad as 1918, when Philadelphia faced coffin shortages and San Francisco suspended garbage pickup because 80 percent of its sanitary workers failed to show up for work. But Orent is irresponsible to claim that the "new field called evolutionary epidemiology" is "proving" that another severe pandemic is impossible. This claim is based on a set of fringe scientific arguments that have been extensively tested—and largely refuted—over the past decade. A recent scientific review of the relevant studies from *Trends in Microbiology* concluded that there is "little theoretical justification and no empirical evidence" for the ideas Orent and her source, Dr. Paul W. Ewald, use in attributing the severity of the 1918 pandemic to the trench-warfare conditions of the Western Front. The argument also goes against common sense. The SARS virus, which was more deadly to infected peo-

ple than even the 1918 flu, emerged without trench warfare. Indeed, it appeared in conditions similar to those in which it is feared the next pandemic flu strain might arise.

SARS in Toronto showed us how a new and feared disease can put a whole city into economic and social crisis for several months, even by striking only a few hundred people. Dramatic as its effects were, however, SARS is easy to control, relative to pandemic flu. SARS patients can be diagnosed days before they are likely to infect others, making isolation and quarantine measures possible and ultimately successful. With flu, a person can infect others within a day of becoming infected, even before his own symptoms appear. Unlike SARS, pandemic flu will spread uncontrolled unless we have vaccine supplies dramatically larger than what we have now or those our health officials are contemplating. Counting on the alleged certainties of one scientist's unproven hypotheses to shield us from another severe flu pandemic is the height of faith-based policymaking. Hoping for the best, and planning accordingly, proved disastrous in New Orleans. We must do better in preparing for the next flu pandemic.

MARC LIPSITCH

CARL T. BERGSTROM

The authors are, respectively, an associate professor of epidemiology at the Harvard School of Public Health and an assistant professor of biology at the University of Washington.

WENDY ORENT RESPONDS:

Marc Lipsitch and Carl T. Bergstrom accuse me of peddling ideology in the guise of science. But there's little accurate science in their letter. First, they assert that flu pandemics occur every few decades. This is meaningless. The only three pandemics we can identify for certain are those of the twentieth century: 1918, 1957, 1968—hardly "every few decades."

continued on page 37

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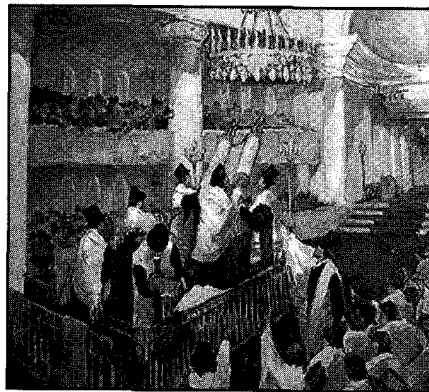
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Jews praying in a synagogue.

Pennsylvania. Previously, he taught at Yale University and the University of Maryland, where he was instrumental in establishing both institutions' Judaic Studies programs. Professor Ruderman is president of the American Academy for Jewish Research, and has a lifetime achievement award from the National Foundation for Jewish Culture.

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Impeachable Logic

I WAS EATING LUNCH WITH SOME friends one warm afternoon in early 2001. The new administration was riding high at the time, drawing wide praise for their ethos of clean living, respectful business attire, punctuality, and other Bushian virtues that were held up as not-so-subtle counterpoints to the disgraced Clintonites. It was all too much to bear. One of my disgusted companions suggested, "We need a scandal."

The group agreed, but we fell out over the specifics. I told the table that only one possible Bush scandal could give us the emotional satisfaction we craved: lying under oath about sex with interns. My reasoning was that, regardless of what sort of scandal could arise, President Bush's defenders would doggedly explain it away. It wouldn't matter if he were caught on videotape selling heroin to schoolchildren so he could funnel the proceeds to the North Korean atomic bomb program; conservatives would defend him, maintain that Bill Clinton was worse, and the whole thing would break down along predictable partisan lines.

Alas, the scandal currently rocking the Bush administration—over who leaked the identity of CIA agent Valerie Plame—does not involve sex or interns. And, as *THE NEW REPUBLIC* went to press, Special Counsel Patrick Fitzgerald had yet to announce any indictments. But there was widespread speculation that Fitzgerald might bring perjury charges, which has produced some entertaining apologetics. The administration's allies have come forward to insist that perjury is a deeply misunderstood—even, if you think about it in the proper light, rather benign—activity. Republican Senator Kay Bailey Hutchison articulated this line last Sunday on NBC's "Meet the Press."

"I certainly hope that, if there is going to be an indictment that says something happened, that it is an indictment on a crime and not some perjury technicality where they couldn't indict on the crime and so they go to something just to show that their two years of investigation was not a waste of time and taxpayer dollars," Hutchison reasoned.

It's usually a mistake to impute intelligent thought to the utterances of senators in general, and Kay Bailey Hutchison in particular. Yet I couldn't help but notice



that there seemed to be a deviously clever arc to the construction of her answer. At the beginning of the sentence, she was describing perjury as a "technicality." By the end, she was defining "crime" in such a way that it excluded perjury altogether. We are meant to think of perjury as a trifling matter akin to jaywalking. By next week, it could even be considered a heroic form of civil disobedience! (Needless to say, Hutchison vigorously supported impeaching Clinton, thundering at the time, "Something needs to be said that is a clear message that our rule of law is intact and the standards for perjury and obstruction of justice are not gray.")

Of course, this argument holds a certain appeal for principled liberals who opposed Kenneth Starr's open-ended prosecution of Clinton. *New York Times* columnist Nicholas Kristof wrote, "We don't know what evidence has been uncovered by Patrick Fitzgerald, but we should be uneasy that he is said to be mulling indictments that aren't based on his prime mandate, investigation of possible breaches of the 1982 law prohibiting officials from revealing the names of spies. Instead, Mr. Fitzgerald is rumored to be considering mushier kinds of indictments, for perjury, obstruction of justice or revealing classified information."

It's certainly true that not even Karl Rove deserves to go to prison for accidental or inconsequential misstatements. But, if Rove didn't do anything illegal in the first place, then why would he obstruct justice or perjure himself in some substantive way? Clinton's motive for lying was perfectly clear: He wanted to avoid the personal and political embarrassment of confessing his perfectly legal affair with Monica Lewinsky. Indeed, a whole strand of Starr's investigation was set up in order to trap Clinton into lying under oath about his sex life. What motive would Bush's men have to lie *except* to thwart the prosecution?

The conservatives who crusaded for impeachment, on the other hand, don't want to equate Clinton's perjury with the potential perjury of Bush's aides. They want to argue that the two are very, very different things and that the contrast redounds to the benefit of this administration. Unfortunately for them, it's not immediately obvious why lying about sex is worse than lying about the exposure of a CIA operative. A battalion of conservative intellectuals have thrown themselves heroically into this logical breach.

The most spectacular efforts have come from *Weekly Standard* Editor William Kristol, a confirmed advocate of Clinton's impeachment (or, as conservatives used to call it, the "rule of law"). A key distinction between the two episodes, Kristol argues, is that "the Clinton White House mounted an extraordinary—and successful—political campaign against the office of the independent counsel and the person of Kenneth Starr." The Bush White House, on the other hand, "has been fully cooperative with, even deferential to, the Fitzgerald investigation."

It is true that the Bushies have said nicer things about Fitzgerald than the Clintonites ever said about Starr. Yet, as the prospect of indictments has grown more likely, the Bush administration has grown markedly less chummy toward Fitzgerald. The *New York Daily News* reported that administration "defenders have launched a not-so-subtle campaign against the prosecutor." The paper quoted one Bush ally calling Fitzgerald "a vile, detestable, moralistic person with no heart and no conscience." And, of course, administration officials may have lied to Fitzgerald and conspired to obstruct his investigation. But, other than *that*, they've been utterly cooperative and deferential.

Another Kristol editorial rages against prosecutors, including—but by no means limited to—Fitzgerald, who are "criminalizing conservatives." This charge may be insane, but—unlike the standard Republican claim that Democrats are "criminalizing politics"—at least it's not hypocritical. Whatever prosecutorial excesses Starr engaged in, "criminalizing conservatives" was not one of them. This could be the principle the right rallies behind during the Plame scandal: No criminalizing conservatives! The beauty of this principle is that it holds up no matter what. Even if their man is found to have lied about sex with interns.

JONATHAN CHAIT

Fed Up

THE MOST INTERESTING rumor in Washington not involving Valerie Plame holds that the president nominated Ben Bernanke to replace Federal Reserve Chairman Alan Greenspan because, after the botched nomination of Harriet Miers, the White House couldn't afford to take any chances. If that's true, then Miers may have already performed a more valuable service to the country than she may ever perform on the Supreme Court.

Bernanke, a former Princeton professor who served on the Fed before being appointed to head the president's Council of Economic Advisers in June, is widely regarded as one of the top five or ten monetary economists in the world. And, though his worldview tends toward the libertarian, he is scrupulously apolitical. "When the news first came that he was a candidate to be named a Fed governor, I thought it was interesting that the Bush administration would nominate a Democrat," a close colleague of Bernanke told *The New York Times* this week. "I worked with him and did not know he was a Republican." Considering that Bernanke's competitors reportedly included Lawrence Lindsey, an outspoken supply-sider and the author of President Bush's 2001 tax cut, and R. Glenn Hubbard, a respected academic economist who has nonetheless explicitly contradicted the collective wisdom of his field in an attempt to sell Bush's tax cuts, this is welcome news indeed.

It has been said that Bernanke could do no better than to continue the remarkable record of the Greenspan Fed. We dissent somewhat from this view. Though Greenspan is clearly one of the more successful central bankers in history, his judgment on monetary policy has not been flawless. During the late '90s, Greenspan clung to the dictum that a central bank must

worry only about inflation in consumer prices, not in the prices of other assets like equities or real estate. And so the Fed stood by, at times even lowering interest rates, while one of the biggest stock market bubbles in history inflated. Then, when the bubble burst at the beginning of this decade, Greenspan cut interest rates far more aggressively than orthodoxy would recommend. The rationale for this was a fear that the market crash would lead to a dangerous deflationary spiral, as in the 1930s. But, in truth, deflation was too remote a possibility around which to orient monetary policy. The long period of low interest rates that ensued thanks to this preoccupation is partially to blame for today's rising inflation.

Bernanke is known to share Greenspan's reluctance to preempt bubbles and is therefore unlikely to be an improvement in this regard. But, when it comes to the other shortcomings of Greenspan's Fed, Bernanke may prove a welcome change.

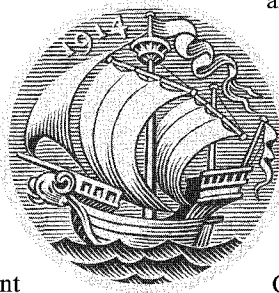
For example, Greenspan has been known to periodically surprise Wall Street, injecting unnecessary volatility into financial markets. To his credit, Greenspan has gradually increased the transparency of decision-making dur-

ing his tenure at the Fed. But he still indulges in the occasional head fake, as when he sent long-term interest rates soaring in June 2003.

Bernanke, by contrast, has long advocated using straightforward rules to set interest rates rather than leaving it to the discretion of the central banker. One practical consequence of this is that a Bernanke Fed is likely to adopt a so-called inflation target, wherein the Fed would adjust interest rates if inflation began to deviate too far from some ideal rate (usually 1.5 or 2 percent). The combination of this reform and Bernanke's ability to speak like a normal human being, in contrast to the oracular Greenspan, would be a step toward making monetary policy somewhat more transparent and predictable.

Most important, Greenspan has been unable to resist giving a sweeping imprimatur to the preferred fiscal policies of the Bush administration. He repeatedly endorsed tax cuts and Social Security privatization, even though, as the nation's chief *monetary* authority, he has only the most limited role to play in fiscal policy debates. All things being equal, a Fed chairman does have an interest in smaller budget deficits, which take pressure off interest rates. But the question of whether to achieve this through raising taxes or cutting spending (as Greenspan prefers) is a political one. It must be left to Congress and the president, not an unelected technocrat.

If one can infer from Bernanke's affinity for inflation-fighting rules a deference to rules in general, then there is reason to believe he will refrain from straying into matters of fiscal policy the way his predecessor has. Given Alan Greenspan's role in the sorry state of this country's finances, that might be accomplishment enough. ■



NOTEBOOK

KAREN HUGHES, ANOTHER FLOP... TED STEVENS, OVER THE TOP

DEAF DIPLOMACY

AFTER HER WIDELY RIDICULED “listening tour” of the Middle East (see “Diplomatic Toast,” October 17), you would have thought that public diplomacy czar Karen Hughes learned a thing or two. But there she was in Indonesia last week, on the next leg of her campaign to improve America’s image in the Muslim world, making the same mistakes all over again. There were the same patronizing and vacuous statements: “My state of Texas is very big,” she told students at an elite Jakarta university. “So you can imagine my surprise to learn that your country, Indonesia, is three times bigger than my big state of Texas.” There were the same gaffes: This time, she inflated the number of Kurds gassed by Saddam Hussein by orders of magnitude (300,000 people, 5,000 people, what’s the difference?).

But far more significant is her inability to confront Muslim anger over U.S. policy. At the university in Jakarta, Hughes encountered outrage over the U.S. war in Iraq. How did she respond? “I’m not questioning at all that the views are deeply held. I understand they’re deeply held,” she told reporters afterward. “I’ve also been in the room and watched as our policymakers made the decision that they felt as a matter of very deep conviction was exactly the right thing that we needed to do.” Not a single infuriated Muslim will be appeased by a saccharine assurance that Bush thought he was doing the right thing, and a condescending nod that such anger is “deeply held” isn’t going to fly without a frank discussion of why that anger exists. Try again, Ms. Hughes—or, better yet, resign and clear the way for someone who will.

TOP TEN LIES

IT SEEMS SOMEONE IN THE WHITE House speechwriting office mixed up his rhetoric with his Letterman when preparing the president’s October 6



Karen Hughes

speech on terrorism. *The Washington Post* reported Sunday that the headline-making list of top ten foiled terrorist plots Bush cited in the speech has “confused” counterterrorism officials because—how to put this?—it makes no sense. Some of the plots, the officials explained, weren’t exactly, um, “well-hatched.” (Translation: Most were far from ready to be executed.) Meanwhile, several of the most prominent plots foiled since September 11—like Richard Reid’s attempted shoe-bombing—mysteriously failed to make the list. Laughably, nearly all of the list-worthy plots came and went without any elevation in the touted Homeland Security threat level.

A spokesman for the National Security Council, which was involved in the list’s compilation, admitted that “the gradations of seriousness [of these plots] is not something I’ve looked into.” Apparently the “gradations of seriousness” question wasn’t much looked into at the

time the plots were being foiled, either: One on the list, a planned jetliner attack against Los Angeles’s Library Tower in mid-2002, failed to warrant a single warning about commercial airplane hijacking. Rather, the FBI raised alarm that summer about Al Qaeda frogmen with “offensive scuba diver capability.” We know which divers Americans should find offensive: members of the Bush team, fishing ever deeper to recover their lost political credibility.

A BRIDGE TO NOWHERE II

LAST WEEK, DURING DEBATE OVER the 2006 transportation appropriations bill, freshman Republican Senator Tom Coburn proposed redirecting funds allocated for two massive Alaska bridge projects to reconstruction of the Interstate 10 bridge across Lake Pontchartrain in Louisiana, which suffered major damage in Hurricane Katrina. The Alaskan bridges have been widely criticized as egregious examples of pork-barrel spending and are “low on the totem pole in terms of the needs of the country,” Coburn argued. There was little reason for Alaska Senator Ted Stevens to fear that this proposal would pass. A similar pork-busting measure had been soundly defeated earlier in the day. (And, in fact, the Alaska proposal was ultimately defeated, 82–15.) But that didn’t stop the 81-year-old Stevens from resorting to the most shameless theatrics: signaling that passage of the amendment would result in his filibustering the bill (“Praise God I have the energy to do what I may have to do. ... The amendment may pass, but if it does, the bill will never be passed. If it does, I will be taken out of here on a stretcher”), resigning from the Senate (“I don’t kid people—if the Senate decides to discriminate against our state ... I will resign from this body”), or martyring himself on the Senate floor (“I come to warn the Senate, if you want a wounded bull on the floor of the Senate, pass this

amendment"). In which case, it's too bad the amendment didn't pass. It would have had a salutary effect on New Orleans—and the Senate.

HACK WATCH, CONT'D

IT WAS BAD ENOUGH THAT BUSH ADMINISTRATION hacks botched the Katrina refugee crisis. Now they seem intent on bringing ineptitude to humanitarian crises worldwide with the nomination of Ellen Sauerbrey to head the State Department's refugee program.

AS THE NEW REPUBLIC went to press, it looked like Sauerbrey would be confirmed, despite vain attempts by Senate Democrats to highlight her lack of qual-

ifications. Sauerbrey—who spent most of her career in Republican politics in Maryland (George Will once called her Maryland's Margaret Thatcher) before becoming a TV host—protested that she was well-equipped to handle a department with a roughly \$1 billion annual budget and more than 100 employees. After all, she said, she'd once managed the U.S. census for three Maryland counties. Hmm, we can't imagine why that didn't silence her critics. Senator Barbara Boxer retorted that she was talking about "a resumé for this job, not about the census or other things." But Sauerbrey pointed out that, in her current job as U.S. envoy for women's is-

ssues to the United Nations, she had met refugees personally. (We here at TNR applauded this logic and would like to submit our own names for consideration for police chief of Washington, D.C. Hey, we met a police officer once!)

Of course, many women's groups haven't been that happy with the job Sauerbrey has done at the United Nations, noting that she has consistently used her position to fight against reproductive rights. Which gives us an idea: Maybe Sauerbrey should switch places with Harriet Miers—they are both unqualified for the Court, but at least Sauerbrey has a clear record on abortion that conservatives could get behind. ■

TNR commentary Excerpts from THE NEW REPUBLIC ONLINE

THE CASE FOR STAYING TOUGH ON ASSAD.

Heir Pressure

By Annia Ciezadlo



This week, as Beirutis huddled over printouts of the Mehlis report—a U.N. report implicating Syria in the February 14 assassination of former Lebanese Prime Minister Rafik Hariri—the talk was somber and wary. A desultory victory rally Friday night drew only a few hundred people to the same

For the United States, a deal with Assad could kill several birds with one stone. But only at the expense of democratization.

Martyrs' Square where hundreds of thousands had marched after Hariri's assassination. On Saturday, Saad Hariri, son of the slain statesman and now head of his parliamentary bloc, demanded an international tribunal for his father's killers. But Hariri's speech was beamed in from the safety of Jeddah, Saudi Arabia. The younger Hariri seemed afraid to set foot inside his own country—

even though the anti-Syrian opposition now controls the government.

In part, this general unease is attributable to the widespread expectation that pro-Syrian elements will retaliate, stepping up a six-month string of bombings and assassinations. But there's another reason for Lebanese apprehension: rumors of a grand bargain between the United States and Syrian President Bashar Al Assad. Such an agreement would supposedly allow Assad to stay in power in exchange for cooperating with the U.N. investigation into Hariri's killing and surrendering the accused to stand trial; ending Syria's meddling in Lebanon; arresting insurgents trying to infiltrate into Iraq through the Syrian border; and cutting off support for Hezbollah, Hamas, and Islamic Jihad.

For the United States, such a deal with Assad could kill several birds with one stone. There's just one problem: By giving Assad a pass, the Bush administration would signal to the Arab world that democracy was never the goal of its game.

"There are two tendencies in Washington," says Chibli

Mallat, a law professor at Beirut's St. Joseph University and currently a senior fellow at Yale Law School. "One tendency is for democracy. . . . [The other] is, 'Let's be realistic, and [make requests only of] those things that operate outside Syria's borders.'" In this case, the "realistic" option is the worse one.

WHAT WE CAN, AND CAN'T, WIN IN IRAQ.

Aim Low

By Lawrence F. Kaplan



So long as U.S. troops garrison Iraq, civil war remains an unlikely outcome. But that's about as uplifting as things get. In terms of what we fight *for*, Iraq may be a democracy, but the results of the constitutional referendum show that it is a democracy where the advantages of democracy have gotten lost, a hollowed-out society where tribe and religion remain the basic affiliations and sectarian identities harden by the day. Gone is the hope that Iraq will be a liberal democratic beacon for the rest of

the Arab world. Gone, too, is the hope that liberal democrats will triumph even within Iraq. What's left is a negative, albeit vital, aim: what we fight *against*. There is nothing inherently wrong in waging a war for negative purposes.

This is a different war now, a war worth fighting, but a war without ideals.

The United States, after all, was not fighting on behalf of the KLA in Kosovo, or a corrupt government in South Vietnam, or a dictatorship in South Korea. It was fighting *against* something, and rightly so. And, beginning with the Al Qaeda and Sunni terrorists who would bring down the government and transform the country into their sanctuary, there's plenty left to fight against in Iraq. But defeating an insurgency is a much narrower, much less exalted enterprise than the democratic transformation of an entire region. This is a different war now, a war worth fighting, but a war without ideals.

* Annia Ciezadlo is a Beirut-based writer.

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Immigration migrates. Going South

BY CLAY RISEN

It's 8:30 on a recent Monday morning, and the county-sponsored day-laborer site in Shirlington, Virginia—a light-industrial neighborhood just across the Potomac River from Washington, D.C.—is bustling. About 60 young Latino men are sipping coffee and chatting in a small parking lot, along one side of which runs an open, green-roofed shelter. Every few minutes, a contractor's truck pulls up and the conversation stops as the men hurry over to see what sort of work the driver is offering. After a bit of negotiating, the contractor picks a few men; they hop into the truck and drive off. The rest return to their coffee.

Overseeing the operation is Andres Tobar, a retired Department of Education employee whose nonprofit, the Shirlington Employment and Education Center (SEEC), has a contract with Arlington County to manage the site. Tobar, a burly man wearing an orange reflective vest, keeps a tight ship. He holds a lottery each morning for the first ten jobs, and he encourages the men to buy SEEC-issued identification cards. "Our role is to keep these guys here in a county-designated area," he says. And, since the site's opening two years ago, it has worked—few locals complain, while both employers and workers seem to appreciate the stability the set-up provides in an often chaotic, largely unregulated sector of the labor force.

SEEC's low profile is surprising, given the controversy that has exploded over a proposal for a similar operation in nearby Herndon, a Virginia suburb close to Dulles International Airport. The town council approved the plan earlier this year, but, stoked by right-wing radio hosts, several residents took the matter to court (the case is pending). The issue got even hotter when Republican gubernatorial candidate Jerry Kilgore stepped in, announcing his opposition to the site. "[The Herndon council is] encouraging illegal behavior," he told the *Richmond Times-Dispatch*. And, boosted by polls showing that Virginians want tougher action against illegal immigrants, Kilgore is pushing the issue for all it's worth. Calling illegal immigration a "public-safety emergency," he has implied that a Northern Virginia Latino gang has ties to Al Qaeda, trumpeted his past opposition to state-college access for children of illegal immigrants, and even promised to "give local police the authority to enforce immigration laws"—a task normally left to the federal government.

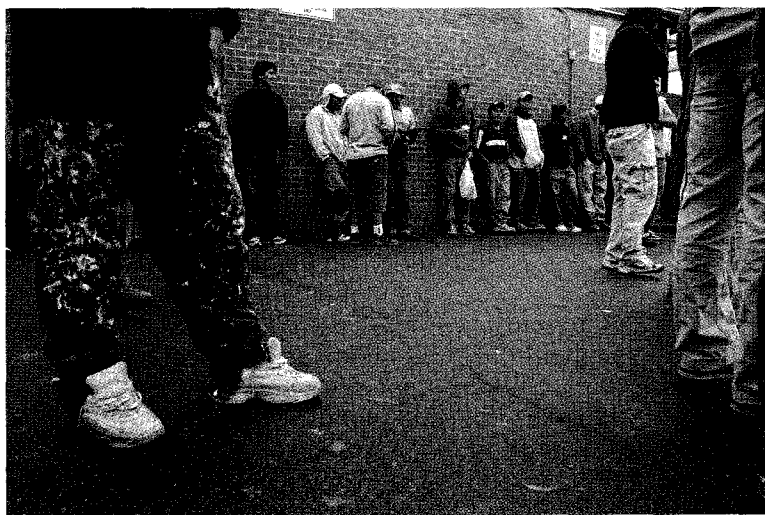
When the Shirlington site opened, illegal im-

migration barely registered in the Virginia political consciousness. Today, it is one of the most important issues—and not just in Virginia. Across the South, activists have held rallies, distributed flyers, and organized anti-immigrant watchdog groups. Franchises of the Minuteman Project, which sprang up in the Southwest late last year, have opened in Alabama, Tennessee, and Virginia. Most ominously, the Ku Klux Klan has been increasingly active in northern Alabama and southeastern Tennessee, using immigration to revive its white-supremacist message. "There has definitely been a startling growth in anti-immigrant sentiment," says David Lubell, director of the Nashville-based Tennessee Immigrant and Refugee Rights Coalition. "It had been growing before now, but the fear and animosity against immigrants hadn't congealed."

Sensing an opportunity, politicians are beefing up their anti-immigrant credentials, with city councils and state legislatures in North Carolina, Georgia, and Tennessee offering plans to crack down on day laborers. And it will likely define many local, state, and federal elections at the midterm—the front-runner Republican to replace Tennessee Senator Bill Frist has already made immigration a key part of his platform. Which is why the Virginia race—and the Herndon site—are so important. Once only an issue in the Southwest, immigration may end up deciding an election almost 2,000 miles from the border. And, if it does, the precedent will be set for anti-immigrant demagoguery regionwide. Which raises the question: How did immigration suddenly become a marquee political issue in the South?

FOR MUCH OF the twentieth century, the South was defined by agriculture and low-wage, low-tech industries, mainly textiles. But that began to change in the 1980s, as state governments lured auto manufacturers, and then high-tech firms, to the region. At the same

Day laborers wait for potential employers outside a 7-Eleven in Herndon, a Virginia suburb. Some Herndon residents are protesting a proposed permanent site for the workers.



time, native companies, such as Wal-Mart, WorldCom, SBC, and Wachovia, shot into the Fortune 500. This economic revolution created hundreds of thousands of high-end jobs, which fueled the spread of suburbs—the construction of which requires an army of short-term workers. The job boom also coincided with a remarkable improvement in education across the region. “The children in rural areas were opting to go to college,” says Loida Velazquez, an educational psychologist who recently retired from working with Knoxville-area immigrants through the University of Tennessee. “But we have a lot of chicken plants, mushroom farms, areas where workers are needed, and it is not easy work.”

By the mid-’90s, the rapidly modernizing Southern economy was facing a labor crisis, and Latino immigrants, legal and illegal, began filling the gap. Between 1990 and 2000, six Southern states saw their Latino populations, the majority of which are direct immigrants, increase over 200 percent, according to the Pew Hispanic Center, with some counties registering more than 1,000 percent growth. “Thanks to ‘hot’ job markets in their construction, services, manufacturing, and technology sectors, for example, states like North Carolina, Georgia, and Nevada gained immigrants—who moved both from within the U.S. and directly from abroad—at rates not previously witnessed,” notes a study by Audrey Singer, an immigration expert at the Brookings Institution. And, while it is hard to pin down exact numbers, researchers estimate that some 80 percent of those immigrants are undocumented.

It wasn’t just the sheer number of immigrants that made this migration different, but where they ended up settling. Traditionally, immigrant populations have been concentrated in cities, where they become Americanized and only later move out to smaller cities or the suburbs. But no one lives in postwar downtowns like Dallas and Atlanta; they lack the dense urban fabric that once cradled immigrants, who now head directly to the suburbs, where housing and jobs are more plentiful. According to Singer’s study, “By 2000, more immigrants in metropolitan areas lived in suburbs than cities, and their growth rates there exceeded those in the cities.” In doing so, they are intermingling earlier, and more heavily, with native populations, many of whom, ironically, moved to the suburbs to get away from the diverse socioeconomic mix of urban America.

Predictably, the result has been a backlash, exacerbated by widespread social and employment insecurity among the region’s newly expanded middle class. Of course, most immigrants are not competing for the jobs most native workers want to pursue, but they do fill the manual-labor jobs that natives look to as fallback positions. Thus, the more insecure a native worker is over his job at the local car plant, the angrier he will be that immigrants are taking the jobs just below him. In addition, with deficits booming and the bills for Iraq and Katrina looming, there is a general sense that public resources are scarce. And, though largely unfounded, there is a rising fear that immigrants, legal and illegal, are draining those resources by swelling the welfare

rolls. Nor is the issue merely economic—despite statistics that show that immigration tends to be correlated with *drops* in urban crime, natives have accused immigrants of increasing crime from loitering, a common complaint about day laborers, to gang activity. Thanks to the emphasis on border security after September 11, many also conflate illegal immigration with terrorism, turning a socioeconomic issue into a national security threat. “You have illegal aliens pushing a negative part of their culture on our society,” says George Taplin, a Herndon activist. “We are realizing a new division in our culture, and people are afraid.”

EARLIER THIS YEAR, Taplin, already involved in the battle over the Herndon day-laborer site, decided to organize a group to promote his views. Having seen press coverage of the Minuteman Project—activists who flocked to the U.S.-Mexico border in April 2005 to conduct “citizen patrols” in search of illegal immigrants—he contacted its organizers and soon set up what he calls his own “chapter of the Minuteman Project,” the Herndon Minutemen. “The support I get is being part of an overall umbrella, and I have the resources of their volunteers,” he says. “I also get an incredible amount of media support”—i.e., the network of radio shows, blogs, and websites that have sprung up around the movement.

Indeed, the immigration backlash in the South has been driven in part by the rapid spread of anti-illegal immigration groups—particularly the Minutemen. This spring in Tennessee, for example, an eastern Tennessee activist named Carl “Two Feathers” Whitaker contacted David Heppler, who helped found the Minutemen and now runs Arizona Border Watch, about setting up a franchise. “I worked with him on some ideas over the phone, then actually went to Tennessee to meet with him and some other people,” says Heppler. Soon, the Tennessee Volunteer Minutemen were born. The Tennesseans then helped activists in Alabama and Illinois form branches in their own states. “One thing the far right has learned is the importance and strategic value of grassroots organizing,” says Abel Valenzuela, who studies day laborers at UCLA.

The result of the movement’s spread, immigrant advocates say, has been to turn what had been a welcoming, if uneasy, local population in an aggressively anti-immigrant direction. “It was not until people began coming from outside, like the Minutemen,” says Velazquez. “They found good ground among certain people, and that has created this reaction.”

Granted, it is unfair to stereotype everyone in groups like the Minutemen as being “far right.” Many, at least outwardly, see immigration as strictly a law-and-order issue and draw a sharp distinction between legal and illegal immigrants. “Until the laws are changed, we need to do our best as citizens to uphold the law,” explains Taplin. But that distinction often gets lost amid stereotyping and scapegoating. Indeed, one Virginia anti-immigrant group active against day laborers calls itself the Virginia Coalition

against Terrorism. That rhetoric, in turn, provides an opening for even more extreme hate groups to gain strength. "They're adding fuel to the anti-immigrant fire," says Lubell. "Right now in Tennessee, the level of hate speech that is accepted is disturbing, and they're trying to make it even more acceptable." So far, actual violence has been sparse, but it may only be a matter of time. In August, a South Pittsburg, Tennessee, man pled guilty to building pipe bombs to kill Haitian and Mexican immigrants while he was a member of the KKK.

IT'S NO SURPRISE, then, that Kilgore, looking for a wedge issue to drive suburban voters away from his Democratic opponent, Tim Kaine, jumped on immigration. Speaking to the *Times-Dispatch*, Kilgore said, "It's beginning to be one of the biggest issues in Northern Virginia when I'm campaigning there. Other than transportation, people come up to you every time you're there—tons of people—and ask you about illegal immigration." Larry Sabato, a political scientist at the University of Virginia, says it will be difficult to measure the issue's impact until after the election, but conservative Virginia blogs have gone wild over Kilgore's stance. As one popular blog, Commonwealth Conservative, noted, "You are witnessing what could be a turning point in this election. This is a hot-button issue in Northern Virginia, and it's a stance that is also extremely popular in rural areas."

Immigrants, after all, make the perfect catchall scapegoat. Want to explain away massive deficits and give yourself an excuse for not getting them under control? Blame immigrants drawing on public coffers. Want to distance yourself from Washington? Blame federal inaction on immigration reform. Kaine, unwilling to veer too far from his liberal base, has been forced to sidestep the issue, saying that the Herndon site is a local issue, while immigration enforcement writ large is a federal responsibility. The result has been to reinforce Kilgore's stance as a tough, law-and-order Republican, which has resonated with Virginia voters.

None of this, of course, is responsible policy-making—that would require addressing why both legal and illegal immigrants go to great lengths to get into the country, as well as recognizing that our economy cannot function without them. But that hasn't stopped candidates like Van Hilleary, a Tennessee politician running for Frist's Senate seat, from coming out early and aggressively on immigration. "I will insist that not only do we return the rule of law to the border, but that we ensure that those who have broken the law are not rewarded and granted amnesty," he said in an August press release—a surprising message from a man whose state lies 1,000 miles from the border. Nor has it stopped countless state and local politicians across the South from proposing and passing legislation that restricts access to social services, bans the use of public funds for day-laborer sites, and forbids the children of illegal immigrants from going to college. The county commission in rural Hamblin County, Tennessee, recently sent a symbolic bill to Congress

for the added social and educational expenses it has incurred thanks to immigration. "Anywhere you have large concentrations of immigrants, legal and illegal, this issue will be used," says Sabato. Such grandstanding creates a negative feedback loop—the more activists push public sentiment, the more politicians respond, which only further legitimizes public anti-immigrant sentiment.

Still, many—perhaps even most—Southern politicians have so far resisted the demagogic pull. Velazquez notes that the mayor of Knoxville, Bill Haslam, has actively welcomed Latino interest groups, while others, such as the Herndon town council, have developed innovative responses to the supply-and-demand realities of the region's immigration wave. But, as the Virginia governor's race has shown, the anti-immigrant card will increasingly be deployed in tight races, especially as Latino immigrants continue to pour into the region. "The numbers are getting to the point where immigrants are much more noticeable," says Lubell. "Go to the supermarket or the movie theater, and you are more likely to see immigrants, to hear a foreign language. That's strange for a landlocked state. People forget they were once immigrants, and that can be sort of disorienting." And it's great news for demagogues as well. ■

Tom DeLay's ties to Roy Blunt. Money Train

BY JOHN B. JUDIS

THESE ARE NOT the best of times for Tom DeLay. Accused of illegally funneling corporate contributions to Texas state candidates, the Houston representative has been forced to resign his position as majority leader and faces continued ethical and legal fallout from his association with disgraced lobbyist Jack Abramoff. But, back in the summer of 2000, Tom DeLay was on top of the world.

At the Republican convention in Philadelphia that August, no one outdid DeLay, who was the party whip at the time, and his chief deputy, Missouri Representative Roy Blunt. Outside the convention hall, DeLay and Blunt stationed five lavishly outfitted antique rail cars, where congressmen could eat and drink, as well as reserve limousines and drivers if they wanted to tour the city—all thanks to DeLay's political action committee, Americans for a Republican Majority (ARMPAC), and Blunt's Rely on Your Beliefs PAC (RoyB). And that wasn't all: DeLay and Blunt dished up breakfast for House Republicans each morning, provided a hospitality tent where parties were held, and hosted an outing at the Aronimink Golf Club and an evening at the Electric Factory, where Blues Traveler played.

These festivities didn't come cheaply. DeLay reportedly raised almost \$1 million to fund the events. And corporations, eager to score points with the powerful Republican leaders, donated their goods and services, too. For instance, according to the *Houston Chronicle*, those antique rail cars were an "in-kind contribution to ARMPAC" from Union Pacific.

A month before the convention, a new law had gone into effect requiring that organizations like DeLay's and Blunt's file regular reports with the Internal Revenue Service (IRS) listing their contributions and expenditures. But, if you wanted to know exactly how much DeLay and Blunt blew on the 2000 convention, you would have to look elsewhere. That's because the documents their PACs filed for the months just before and after the convention list hardly any contributions or expenditures at all—certainly nothing that would explain the level of spending that took place in Philadelphia. A legal or ethical oversight, perhaps, but, if so, it seems not to be the only one that took place in that heady year, when DeLay came into his own as the most powerful Republican in Congress. The story of the missing convention expenses (and a related tale of the curious path taken by \$150,000 that DeLay's PAC gave to Blunt that spring) reveal a lot about the symbiosis between DeLay and Blunt—and the way the two men turned greed and political power into cash.

THE COLLABORATION BETWEEN the congressmen began in 1999, when DeLay made Blunt his top deputy. The two worked together rounding up votes, but DeLay also introduced Blunt to the political machine he was building—one that, as I've written before, linked his congressional office to the country's wealthiest businesses and donors through a network of lobbies and PACs run by his own aides and former staff (see "Tammany Fall," June 20). At the center of this machine was the newly established Alexander Strategy Group (ASG), a lobbying shop founded in 1998 with DeLay's blessing by his former chief of staff, Ed Buckham. ASG's payroll included DeLay's chief political aide, James W. Ellis, as well as DeLay's wife, Christine.

ASG's lobbying business started slowly, and it initially seemed to rely as much on political management as on lobbying for its income. Its partners and staff ran ARMPAC and several obscure but well-funded organizations, including the U.S. Family Network (USFN) and Americans for Economic Growth. Because these groups did not explicitly support candidates, they were able to raise unlimited amounts of soft money without disclosing their donors or their expenditures. Some of these organizations, the Federal Election Commission (FEC) later ruled, were involved in laundering soft money. But they were also used to subsidize ASG. The USFN, for instance, which raised over \$1 million, bought a Washington, D.C., townhouse for ARMPAC and ASG and paid out huge sums for fund-raising and consulting.

One of the obscure organizations ASG managed was a "nonfederal" branch of ARMPAC, so called because it didn't contribute to candidates for federal office and thus did not have to file any paperwork with the FEC. It was this branch of ARMPAC that raised money for the convention. According to his staff, Blunt worked with DeLay and Ellis on the nonfederal ARMPAC. Blunt also launched a nonfederal branch of RoyB in July 1999, run by Ellis and ASG. In its first few months, Blunt's nonfederal RoyB appeared to operate independently of DeLay's nonfederal ARMPAC, but, in 2000, they became intertwined.

According to Missouri law, organizations that give to state candidates have to file a report with the Missouri Ethics Commission at least once per quarter. Blunt and Ellis didn't do this initially, but, in July 2000, they finally complied, although with less than full candor. According to these reports—obtained from political watchdogs PoliticalMoneyLine.com and FiredUpAmerica.com, a website operated by veteran Missouri politico Roy Temple—the nonfederal RoyB claimed receipts of \$249,837 for 2000. Of this total, \$150,000 consisted of two transfers in the spring from DeLay's nonfederal PAC to RoyB's nonfederal PAC.

PACs sometimes transfer funds to one another, but they do so most often in order to spread the credit around for political contributions. (A gives to B to give to C, who is then grateful to B.) RoyB made its own share of political contributions in 2000—almost all of them to Missouri Republican organizations that could pass the money on to Blunt's son Matt, who was running for secretary of state. But RoyB didn't spend all its money in this way. In fact, over the course of the year, it recorded expenditures of just over \$150,000 to ASG and other DeLay operations. That amount looks suspiciously similar to the \$150,000 RoyB

Representatives Tom DeLay (right) and Roy Blunt (left) were the hosts with the most during the 2000 GOP convention in Philadelphia. But how did they pay for their largesse?



took in from DeLay's ARMPAC during this same period.

In 2000, RoyB ran up a \$145,000 bill with ASG for what it described as either "consulting" or "strategy and fundraising," and it paid out another \$5,281 to ASG's USFN and Ellis for rent and utilities. In addition, right after the first \$50,000 arrived from ARMPAC, RoyB donated \$10,000 to DeLay's Foundation for Kids, a Texas-based charity that DeLay uses for p.r. and to justify golfing events. Could ASG have been worth \$145,000 in "strategy and fundraising" to RoyB's PAC? Well, RoyB actually raised only \$99,837 in 2000. Spending \$145,000 to raise less than \$100,000 doesn't make a lot of sense. And Blunt did not need strategic advice from Ellis and other Washingtonians to know how to spend his money in Missouri. In other words, the \$145,000, along with the \$10,000, looks like a subsidy to ASG and to DeLay himself that the Houston representative was trying to hide by transferring the money from one nonfederal PAC to another.

Why would DeLay and Ellis want to hide the money? One possible reason is that their other political committees were beginning to come under scrutiny. In early May, the Democratic Congressional Campaign Committee would bring suit against the USFN and two other DeLay committees for racketeering. And, at this point, RoyB was still flouting Missouri's own disclosure rules. By sending the money to RoyB, DeLay and Ellis hoped, perhaps, to avoid having the transaction and the subsidy to ASG discovered.

ATTTEMPTS TO GET to the bottom of this mysterious \$150,000 ARMPAC contribution have only raised more questions about DeLay and Blunt's conduct. DeLay's office was unwilling to respond to questions about ARMPAC, but Burson Taylor, Blunt's director of communications, tells THE NEW REPUBLIC that both the nonfederal ARMPAC and the nonfederal RoyB were engaged in raising funds for the convention. She claims that the \$150,000 simply represented one convention account reimbursing another. Says Taylor, "It was a joint operation. Which is why it is so misleading to talk about a transfer. ... ARMPAC and RoyB jointly raised the money. ... If you and your friend were going to have an event, and he buys the chips and drinks and pays a certain amount, and then you gave him \$18.75, was that a transfer of funds?"

Taylor's explanation suggests that the \$150,000 was actually used at the convention, but, if it was, it should show up as expenditures on RoyB's filings with the Missouri Ethics Commission and the IRS. But, remember, there's almost nothing on RoyB's reports that looks like it was directed to the convention. In fact, there is only one item that is clearly related to the festivities in Philadelphia: a payment of \$5,782.50 to UPS to "reimburse airfare to nat'l conv." Failing to disclose any additional expenditures over \$100 would be a violation of Missouri and also of federal law. According to the new campaign law, the RoyB and ARMPAC nonfederal PACs would have had to begin filing IRS forms after July 1.

DeLay's forms, which he began filing that summer, also show few expenses—either in the form of direct expendi-

tures or in-kind contributions—that are obviously traceable to the convention. DeLay's IRS report covering July 1 to September 30 lists only \$88,188 for expenditures, of which \$36,000 went to ASG and \$25,856 to other consultants and fund-raisers. Even if DeLay had not received any cash contributions after July 1, in-kind contributions and expenditures at the convention should still have shown up on the forms. Contrast DeLay's report with the one filed by Dick Armey's Majority Leader's Fund. At the convention, Armey, like DeLay, dodged reporters' queries about his lavish spending. But Armey reported the details to the IRS. His PAC listed \$545,870 in expenditures for this period, including *many* specific expenditures at Philadelphia hotels, arenas, and concert venues, as well as in-kind contributions and expenditures from companies like Coors.

If Blunt and DeLay received similar contributions and made similar expenditures but failed to list them, then they would seem to owe the IRS, as well the American public, an explanation as to why not. When I asked Taylor where the expenditures might be listed, she acknowledged the problem. "I will have to try to figure that out and get back to you," she said. But, a week later, she has yet to get back to me.

When I tried to find out what ASG had done for its \$145,000, officers there didn't respond, and Blunt's staff would not talk on the record. One senior Blunt staffer, however, offered an explanation on background: "That was the first year of the RoyB fund. There was no staff, no office space, no pencils, nothing that belonged, so the RoyB fund, in its inception, contracted with ASG to provide everything from fund-raising, to congressional race analysis, to pens, pencils, and scotch tape. A lot of those expenditures don't show up on reports. They were phone lines and computers; they were helping to establish computer networks."

This explanation, however, falls apart at every turn. The nonfederal RoyB was established in July 1999, not January 2000. It did pay for office space, telephones, computers, and office supplies, but these expenses are listed separately and specifically on the RoyB forms. It also paid for an accountant. RoyB could not have legally paid ASG for advising on congressional rather than nonfederal races—Congress is outside its purview. And, if RoyB paid ASG for "pens and pencils," in addition to "strategy and fundraising," but did not report these specific expenditures, it failed to adhere to Missouri's campaign laws, which require political committees to specify what they spend money on in no uncertain terms. What ASG did for the \$145,000 they got from Blunt's PAC, and where the convention expenditures were listed, remains a mystery.

DeLay and Blunt are not, of course, the first politicians to bend campaign laws to their advantage. But, in their recklessness and ostentation—in their eagerness to flaunt the power that money can confer on politicians—they easily exceeded their immediate predecessors. DeLay is now being called to account for what he did in Austin in 2002. But DeLay and Blunt still need to explain what happened in Philadelphia two years before. ■

Miers is no historian. Original Sin

BY EDWARD LAZARUS

HARRIET MIERS MUST be pretty surprised by the conservative outcry over her nomination. After all, her October 3 remarks, upon being named as President Bush's pick to the Supreme Court, were a calculated wink and nod to conservatives that they could count on her all the way. While she did not explicitly identify herself as a "strict constructionist" who would, as conservatives demand, interpret the Constitution according to the intent of the Framers, she did say that she would apply the laws "strictly" and stay "true to the Founders' vision of the proper role of the courts in our society." In this way, she suggested that her judicial outlook mirrored the "originalist" philosophy of such model conservatives as Antonin Scalia.

But, instead of being placated by these gestures, conservatives have attacked Miers as unqualified, arguing that she has never served on a federal court and has little grounding in constitutional doctrine. True, the last nine Court nominees over the past 19 years have been federal appellate judges, including several with strong ties to academia. But other models abound. Earl Warren, for example, was a prominent politician. Lewis Powell was a respected practitioner and civic leader. And Byron White came from the Department of Justice, having wielded no greater responsibility than Miers (albeit with a more elite Rhodes scholar and Yale Law School pedigree).

None of these justices arrived at the Court versed in constitutional interpretation. Nor did they much engage in jurisprudential pyrotechnics during their long tenures. Instead, they adopted interpretive methods that hewed closely to their past experience and natural temperaments. Warren used his political talents and force of personality to lead his colleagues into a civil rights revolution, while Powell and White—as befitting their considerable experience as practitioners—became judicial pragmatists whose opinions depended on the specific facts of each case, the interests to be balanced, and the precedents to be applied. They were—as Chief Justice John Roberts professes to be—"bottom-up" judges, not top-down theorists.

Miers almost certainly has the tools to succeed as a justice in the same way many of her predecessors did—by playing to the strengths she developed as a longtime litigator and legal counselor. Just like White, Powell, and other former practitioners, Miers has the expertise to adopt fact-

and precedent-based approaches to legal interpretation. The problem is that she seems to be moving in the opposite direction. By suggesting that she may be a constitutional originalist, Miers risks pledging allegiance to an especially academic and abstract interpretive approach, for which she is stunningly ill-suited.

THE JURISPRUDENCE OF original intent is susceptible to many criticisms. One of these is the paradox that the Framers of the Constitution apparently did not intend for future generations to interpret the Constitution according to their intent. Thomas Jefferson, for example, wrote critically of men who "look at constitutions with sanctimonious reverence and deem them like the ark of the covenant, too sacred to be touched." But, even setting aside theoretical objections, interpreting the Constitution in light of the Framers' intent is an exceedingly difficult intellectual enterprise.

To begin with, a sincere originalist has to digest the diverse views of a host of important thinkers from the Founding era, such as Jefferson, Madison, Hamilton, Adams, and Wilson. That task alone requires deep immersion in source materials (and a historiographer's ability to assess propagandistic materials like *The Federalist Papers*), as well as knowledge of the English political history and enlightenment philosophy against which the Framers conceived their own ideas.

The sincere originalist, moreover, has to be an expert with respect to at least two "founding moments"—the moment of the Constitution's original creation and ratification and the moment of the Constitution's profound rewriting after the Civil War, when the Thirteenth, Fourteenth, and Fifteenth Amendments were added. This means, just for starters, understanding the views of the Reconstruction Republicans who crafted the equal protection and due process clauses that lie at the heart of many modern constitutional disputes.

Once an originalist masters these materials, hard theoretical choices must be made. These include how to reconcile conflicts among the Framers, who disagreed vehemently on any number of issues; how to resolve tensions between the actual words the Framers chose (which often sweep broadly) and their specific intentions (which were often narrowly focused); and, of course, how to apply the Framers' intentions to contemporary legal problems (which were beyond imagining when the document was crafted).

Scalia, a leading academic and public intellectual before joining the judiciary, has sometimes managed this complex undertaking. For example, in trying to give meaning to the Constitution's prohibition on "cruel and unusual punishments," Scalia has parsed the English history of the Bloody Assizes and the punishments attendant to Titus Oates's "Popish plot" as a prelude to what the Framers had in mind when they crafted our Eighth Amendment.

A lack of a track record as a public intellectual or legal thinker doesn't definitively disqualify a justice from becoming a successful originalist. Even for nonacademic jus-

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tices, it is possible to evolve from a constitutional novice into a jurist guided mainly by the Constitution's text and history. Take Hugo Black, the former Klansman and ardent New Deal senator whom Franklin Roosevelt put on the Court to protect his economic reforms. Black started out in a state of ignorance and was criticized to the point that Justice Harlan Stone (later elevated to chief justice) suggested that law professor and future Justice Felix Frankfurter might want to tutor Black "until he is a little surer of himself." Yet, through long summers and spare moments spent combing through original source materials, Black became an expert in constitutional history, and in the history of the Fourteenth Amendment in particular. The fruits of that scholarship remain important today, including his now much-admired originalist stand against the approach to interpreting the due process clause that produced *Roe v. Wade*.

But, with all due respect to Harriet Miers, she is no Hugo Black, who came to the Court with what one colleague described as a "primitive" but "powerful" intellect and an insatiable intellectual curiosity about history and philosophy. Miers is a litigator and administrator of modest intellectual ambition. Nothing in her background suggests a comparable turn of mind. Indeed, even if she knows enough about competing interpretive theories to make an informed choice in favor of originalism, it is hard to imagine an approach to constitutional interpretation that Miers is less qualified or inclined to pursue seriously.

Just think about how she has spent her free time. While Black immersed himself in the classics, Miers picks up John Grisham novels. In private practice, while Roberts volunteered for one challenging constitutional law case after another, Miers generally took on small family law matters. Even inside the White House, according to staffers, Miers never immersed herself in the great debates over policy. One former White House colleague, David Kuo, wrote: "When she was elevated from staff secretary to deputy chief of staff for policy, everyone was shocked. She didn't know policy."

IF MIERS LACKS both the experience with constitutional issues to be an originalist and the intellectual curiosity and ambition that might help her become one, then what are the implications of her embracing an originalist philosophy? If she does so, she will almost certainly be making the cynical choice to be a faux originalist—a justice who claims to be engaged in a search for original intent but who is really just using its language to dress up policy preferences being read into the law. This charge of cherry-picking originalist sources to support preconceived views has been leveled against Scalia, and, to a greater extent, Justice Clarence Thomas. After all, can it really be that originalism leads to uniformly conservative political results, as their opinions seem to suggest?

In short, a Miers choice in favor of originalism ought to be automatically disqualifying. Conservatives and liberals

alike profess disdain for unprincipled, highly political, results-oriented judging, and, in all likelihood, that's what we would be getting. But, for those on the right who seek a dramatically more conservative Court at just about any price, a cynical declaration of Miers's originalism—in essence, a political promise with respect to *Roe* and other key issues—is the most they can hope for. And, if they get this much, they'll take Miers—embarrassing mash notes, stilted prose, and all. ■

Health care in South Africa. Medical Error

BY DAVID ADLER

CONSERVATIVE LAWMAKERS AND many business leaders are touting health savings accounts as the silver bullet to fix America's dysfunctional health care system (as Jonathan Cohn chronicles in "Crash Course," page 18). But, while widespread use of health savings accounts is untested here, there is a country with a decade's worth of experience with similar consumer-driven health plans: South Africa. The experience there should serve as a cautionary tale for anyone who thinks these accounts will solve America's health care crisis. In South Africa, consumer-driven health care has had some decidedly unhealthy effects.

South African health care has some similarities to care in the United States. Medicine is often just as advanced (remember, South African doctors performed the world's first heart transplant in 1967). And, like the United States, South Africa is a developed country without national health insurance. Instead, consumer-driven plans with medical savings accounts (equivalent to health savings accounts in the United States) are held by over half of South Africans with private health care. (Private health care there covers nearly 15 percent of the population, including almost all high-income South Africans, regardless of race. Everyone else is forced to rely on the underfunded public sector.)

These consumer plans have their roots in the final days of apartheid, when health insurance, like many sectors of the South African economy, was rapidly deregulated because business leaders feared the incoming African National Congress government. Until then, South Africans obtained private health coverage through employer-

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sponsored or profession-based insurance plans that were tightly regulated by the government. But, after 1994, South Africa quickly acquired one of the least regulated insurance markets in the developed world. Today, some 150 “medical schemes” (the telling term South Africans use for insurers) vie with one another to attract members.

In the frenzied atmosphere following deregulation, schemes began to offer something new: a medical savings account not tied to any particular employer and coupled with a high deductible insurance plan. But, at first, not everybody could join. Those with a high risk of claiming benefits—generally, people over 55—were barred from participating. The result was an unprecedented restructuring of the insurance market. The young and healthy migrated to the new consumer-driven plans and away from traditional employer-based schemes. Meanwhile, the old and infirm were left in traditional insurance schemes. Discovery Health, the pioneer of consumer-driven plans, grew to become the largest medical-scheme administrator in the country. (Through a subsidiary called Destiny Health, the company is now active in the United States.)

In at least one way, the plans have been a success: They are enormously popular, a phenomenon the insurance industry attributes to people’s preference for managing their own day-to-day medical expenses. Additionally, the costs for visits to general practitioners, which are typically paid out of medical savings accounts, have been held somewhat in check. These two factors have led conservative and libertarian groups in the United States, such as the Texas-based National Center for Policy Analysis, to write glowingly about the South African experience.

At a macroeconomic level, however, there is less cause for celebration. Private health care costs have hardly been contained. In fact, the opposite is the case. Between 1996 and 2001, the cost of specialty care increased 43 percent, and the cost of hospital care rose 65 percent. This represents a marked increase from the inflation rates for the five years prior. There have also been substantial increases in plans’ administrative costs (which include profits). Meanwhile, the number of South Africans lacking health insurance—which is the bulk of the population—has continued to grow rapidly. Consumer-driven health plans have also done too little to address South Africa’s most pressing health problem: HIV. Before this year, many medical schemes covered only badly needed antiretroviral treatments as part of their medical savings accounts, and they stopped providing the treatments when funds dried up. (In January, the government mandated minimum coverage for HIV.)

Government regulators in South Africa, known as the Council for Medical Schemes, are intensely concerned about the effect of the consumer-driven plans. In their view, the plans’ true *raison d’être* is to allow insurers to cherry-pick healthy people. Medical savings accounts are a method for insurers to “cream skim” the healthy, because these plans work best if you will have little need to go to the doctor.

The South African story, then, is a move from a noncom-

petitive insurance environment to a competitive one, but the competition wasn’t by hospitals to provide the best or cheapest care, but rather among insurers to get the healthiest patients. Consumer-driven plans are central to this process, because they are ideal for “risk-selecting” the young and fit, who have flocked to the new plans. Not in need of expensive medical care, the healthy could watch their account balances grow, leaving the truly sick behind in traditional plans.

This particular type of competition—to attract the healthy—in turn led to price increases, because insurers had little incentive to control the prices medical providers charged. After all, it was no longer their problem. It was up to the patient to worry about costs, and the patient hardly had the same bargaining power as the insurers once did. According to a key South African regulator, Alex van den Heever of the Council for Medical Schemes, “Competition based on the shifting of risk and cost to members only reduced the incentives of health insurers to directly manage health care service providers.”

THE SOUTH AFRICAN experience with consumer-driven health plans and medical savings accounts may soon be drawing to a close. In 2002, the country’s Department of Health conducted an inquiry into the South African health system that, though nonbinding, has been influential and is expected to lead to change. Its conclusion: Savings accounts should be phased out of medical schemes. As its authors wrote, “*The focus of health policy needs to be on risk-sharing and cost containment. None of these key health policy objectives can be achieved through medical savings accounts*” (italics in original).

South Africa’s experiment with consumer-driven health plans raises important questions for policymakers in the United States currently contemplating widespread implementation of health savings accounts. It suggests that such accounts can indeed foster greater competition and transform a health system—but not in the ways their proponents intend. Partly in response to the troubling health care trends brought about by the dominance of consumer-driven medical schemes, South Africa is now in the process of reregulating the health care industry and moving away from medical savings accounts. South Africa gives us a chance to look before we leap—and hopefully step back from the edge. ■

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The danger of consumer-driven health care.

Crash Course

BY JONATHAN COHN

A FEW HUNDRED dollars a year. Maybe more than a thousand. Rex Delph really couldn't be certain how much larger his medical bills would be if his employer, the school board of Knox County, Tennessee, decided to swap health insurance plans. All Delph knew was that even a modest increase could end up financially overwhelming him.

The problem for Delph wasn't so much his own medical bills. The 45-year-old school electrician was in relatively good health, except for a hernia that doctors said he could live with as long as he watched his diet. The problem was his wife, Jacqueline, who had been diagnosed with Addison's disease about two years earlier. Addison's occurs when the adrenal gland fails to manufacture enough of certain hormones. If treated, it's not fatal. (John F. Kennedy lived with it.) But it's also not curable, with symptoms that can include severe muscle weakness, vomiting, and depression. "She's lost so much strength," Delph would later explain. "She can still get around, but she has to be real careful in what she does. She can't go to the amusement park and get all whipped around. She's not supposed to lift anything more than ten pounds."

The standard treatment for Addison's is steroids. And, in Jacqueline's case, they had certainly helped. But the steroids were expensive, as were the checkups to monitor them—not to mention the occasional hospital visits her condition required. The insurance Delph had, identical to the generous policy the county's teachers had won through their union, covered most of these costs. But, this August, the school board, desperate to shave its budget, began talking formally about adopting a new policy with lower premiums but much higher co-payments. This would mean larger out-of-pocket expenses every time Delph or his wife filled a prescription, saw a physician, or went to the hospital.

For employees in good health, the ones who didn't need much medical care, it was actually a pretty good deal. And, when the school board circulated a survey before taking up the matter formally, several of those employees expressed enthusiasm for the lower premiums and the modest, yet much-needed, measure of financial relief they would bring. "What took so long??" one employee wrote, according to an account in the *Knoxville News-Sentinel*. "This is more affordable for single, 1-parent heads of household. Thanks." But, for Delph, who made around \$30,000 a year and whose

wife could no longer work, those \$200 physician visit deductibles and \$20 prescription co-pays loomed large: "Right now, with the bills I've got, we're just barely breaking even," he said. "It would have been a pretty good hardship."

Delph was hardly the only American confronting such a situation. On the contrary, with the economy sluggish and health care costs rising so quickly these last few years, employers have increasingly taken action like the Knox County school board was contemplating: They've passed on some of the increased costs to their employees, as higher deductibles and co-payments. According to a survey of large employers released just two weeks ago by Hewitt Associates, the consulting firm, out-of-pocket medical expenses alone is costing workers an average of \$1,366 this year, up from \$708 in 2000. And that figure is just the *average*. People who use a lot of medical services this year will likely pay more—in some cases, a lot more.

Is that the way we want to pay for health care in America? President Bush seems to think so, as does a chorus of Republican officials, conservative intellectuals, and corporate chieftains. They would like to move the country even further in the direction Knox County was thinking of pushing its workers, from a system of comprehensive insurance to one in which most people have insurance covering only the most catastrophic costs—i.e., the really big bills that come from a life-threatening illness or a severe accident. In the scheme they envision, Americans would pay for everything else on their own, preferably by using money they've invested in special, tax-preferred "health savings accounts," or HSAs.

While the champions of this worldview make many claims on its behalf, the most politically important one is that, by encouraging consumers to take more control over how they pay for medical treatment, HSAs, combined with high-deductible insurance, will help keep health care affordable. "With HSAs, we introduce market forces," Bush said during a speech in Pennsylvania last year. "It means you can shop around for the care that's best for you. It means you'll be able to get better health care at better prices, 'cause you're the decision-maker." But, as the Delphs could attest, the transformation Bush and his allies envision could well have a blunter, less appealing effect: It would place the burden for severe medical expenses more squarely on families that incur them. Not only would that force families like the Delphs to choose between taking on debt and forgoing medical care. It would also represent a sharp departure from the philosophy of solidarity and



Some ideas are more durable than others.

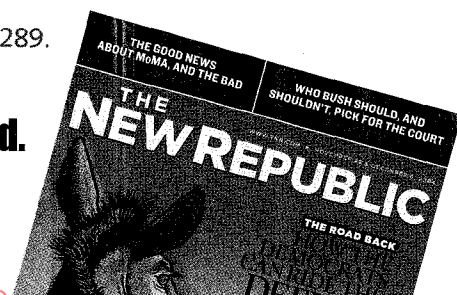
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shared risk that has governed America's approach to health care for over 70 years.

THE QUESTION OF how to distribute the financial responsibility for America's health care bill dates back to the late '20s and early '30s. This was a time when widespread use of x-rays, development of sophisticated anesthetic techniques, and other medical advances meant that doctors and hospitals could cure rather than just comfort. But with these new abilities came new costs, and, for the first time, large numbers of people were struggling to pay their medical bills. In 1929, half the country's families would have had to pay the equivalent of one month's income for a hospital stay.

Of course, it was only the families with serious medical problems that ran into such high costs. But that was precisely the problem, according to the Committee on the Cost of Medical Care, a privately funded task force whose 1932 report is considered the first thorough review of health care costs in U.S. history. The Committee determined that, although the total cost of health care in the United States (then around 4 percent of national income) was one the nation could certainly afford, most of the burden fell on a relatively small number of people who, because of accidents or serious disease, required extensive medical care. And, while some people saved money for the possibility of future medical expenses, the Committee concluded, "[T]he unpredictable nature of sickness and the wide range of charges for nominally similar services render budgeting for medical care on an individual family basis impracticable."

Other countries were solving this problem by creating national health insurance systems that covered all (or nearly all) citizens, thereby spreading the financial burden for medical care to the broadest possible group. But, while reformers in this country had been agitating for a similar program since the late Progressive era, even during the Great Depression the opposition of powerful interest groups like physicians, who feared intrusions into their professional autonomy and limits on their incomes, was enough to keep universal health care off the political agenda. (FDR is said to have dropped health care from the Social Security Act, because he feared the hostility from state medical societies might doom the entire package.)

In the absence of national health care, a much different system evolved. It began in 1929, in Dallas, Texas, when Baylor Hospital, desperate to fill its beds with paying customers rather than charity cases, approached the public school teachers of Dallas with a deal: If most of the teachers would agree to pay the hospital a small amount of money every month, then the hospital would agree to provide medical services to any teacher who needed it, anytime. The plan was a hit, and soon hospitals around the country, most of them facing similarly dire financial situations, began copying and expanding the Baylor plan, which eventually became the Blue Cross system. By the 1940s, it was enrolling millions of new people each year—a pace that

quickly lured the commercial insurance industry, which had dabbled unsuccessfully with disability-style benefits in the early twentieth century, back into the business.

As private insurance spread, the link to employment became entrenched—in part because large workforces guaranteed a large number of healthy beneficiaries to cover the costs of those few with severe illness, and in part because employers themselves found it advantageous. (As Yale political scientist and occasional *TNR* contributor Jacob S. Hacker has noted recently, private job-based insurance not only warded off the threat of government intrusions into health care, which business opposed philosophically; it also helped undercut the appeal of unions.) Government encouraged this arrangement by exempting employer health insurance from taxes—in effect, making health insurance connected to a job more valuable than cash on a dollar-for-dollar basis. By the 1970s, the vast majority of working-age Americans had private health insurance through their jobs. They still paid for this coverage indirectly, through the lost wages their employers were spending instead on health insurance. But they shared it among themselves, for relatively modest sums, rather than facing it individually, at potentially crushing levels. And most of these people seemed to think the system worked very well.

But it might have worked *too* well. Critics had long worried about the "moral hazard" of insurance—the possibility that generous benefits might encourage people to seek care they really didn't need or to consume care with little regard for its cost. In the '70s, an experiment by the RAND Corporation seemed to bear this out, at least in part, by demonstrating that, once health plans exposed people to some medical costs—by, say, requiring them to make co-payments for doctor and hospital visits—they used less health care. In previous decades, employers hadn't really obsessed over moral hazard, if only because health care really wasn't that expensive once you distributed the cost broadly. But, by the '70s, with medical costs gobbling up more than 7 percent of national income while global competition was squeezing U.S. manufacturers, employers became anxious to limit the liability for their workers' health care expenses that they had worked so hard to secure a few decades before.

In the 1990s, this mindset led employers to switch their workers into health maintenance organizations (HMOs) and other forms of managed care. Managed care promised to hold down medical bills by restricting beneficiaries' access to medical services—and then bringing down the price of those services through hard-nosed bargaining. Managed care put a great deal more power in the hands of insurance companies. And, at least for a few years, they were successful at holding down the cost of medicine. But managed care's techniques were never popular. Individual doctors and hospitals resented the medical second-guessing, not to mention the bullying about prices. Consumers resented the limits on what doctors they could see and what treatments they could get. Soon, politicians on both sides of the aisle were looking for another way.

JESSE HIXSON WAS a relatively small-time government economist with a big-time economic problem on his hands. The year was 1974, and Hixson, who worked for the Social Security Administration, had been asked to help devise a system for containing the cost of Medicare, the federal health insurance program for the elderly that had been established during the '60s and was already starting to overwhelm the federal treasury.

At the time, Medicare worked a lot like traditional private insurance: It covered pretty much everything doctors or hospitals ordered up, at whatever prices they set. Many experts thought health care providers were the source of the program's trouble—that, in order to control costs, Medicare needed to start demanding hospitals charge less. Hixson, by contrast, focused on the patients, arguing that they had insufficient incentive to question medical decisions or seek out cheaper treatments—a classic example of moral hazard. Private insurance had already been adapting to deal with this problem, introducing larger co-payments or deductibles in an effort to make beneficiaries think twice before seeing a doctor or agreeing to a treatment. Hixson figured he could do that idea one better: He suggested giving Medicare beneficiaries special savings accounts, which they would use to cover medical expenses.

Hixson's idea didn't persuade the Medicare bureaucracy, which eventually decided on a different method of restraining the program's costs. (In the early '80s, the federal government would start paying hospitals based on diagnosis, rather than the services rendered, as a way to force down their charges.) But Hixson kept talking up his idea anyway, and continued to do so even after he left the government to work for the American Medical Association. Hixson eventually got the attention of another economist, John Goodman. Goodman, who ran a Dallas-based conservative think tank called the National Center for Policy Analysis, was philosophically sympathetic to the idea that altering patient incentives was the key to making health care work like a free market again. And, while Medicare might not have been interested in the idea, Goodman figured that private insurers might be. Together with some colleagues, he fleshed out the idea of "medical savings accounts" (MSAs), proposing that they get tax benefits like IRAs. He spread the word around Washington, where his think tank helped coordinate a series of meetings among business leaders and conservative intellectuals. That got the attention of a third key figure, J. Patrick Rooney, chairman of Golden Rule Insurance.

Rooney, who was on his way to becoming one of the nation's better-known right-wing activists, shared Goodman's ideological predisposition. But MSAs had a certain financial appeal to him as well. Golden Rule, which Rooney had rescued from bankruptcy a decade earlier, was in danger of losing ground again because it could not keep up with the large insurers that were erecting huge managed-care networks of doctors and hospitals to lure patients. MSAs looked like an ideal niche business that Golden Rule could

capture and parlay into a permanent market presence. Rooney began with Golden Rule's own employees, replacing their traditional insurance with high-deductible coverage plus MSAs, which Golden Rule funded, allowing employees to keep what they didn't spend. Then he went to work on Washington, selling the idea that MSAs could work for the rest of the country if the government made the money in them tax-free, as Goodman had envisioned.

The health savings crusade by Goodman and Rooney had a certain quixotic quality about it in those early years. But that changed in 1993, when President Clinton proposed a comprehensive health care overhaul that would have guaranteed affordable private insurance coverage to every American, with most people likely to get their coverage through managed care. Republicans, convinced that they couldn't beat something with nothing, were desperate for an alternative. And Goodman's plan fit their philosophical outlook perfectly. As they saw it, the Clinton plan took power away from patients by shunting them into managed care plans; the Goodman plan empowered patients by giving them more freedom to choose doctors and pick treatments. The Clinton plan fought high prices by giving government bureaucrats the power to regulate insurance premiums; the Goodman plan fought high prices by giving consumers the power to shop for bargains. The Clinton plan created a fiscally reckless entitlement; the Goodman plan instilled responsibility by punishing the profligate and rewarding the thrifty.

In the end, the Republicans were able to defeat Clinton-care without actually rallying behind an alternative. But the advocates of MSAs had made an impression on the GOP leadership, particularly Newt Gingrich. Gingrich ended up forging a close working relationship with Rooney, who, in addition to sharing the House speaker's passion for school vouchers, was a top source of funding for Gingrich's own political ventures and that of the Republican Party. (In 1993–1994, according to an account in *Mother Jones*, Rooney and his affiliated political action committees steered nearly \$1 million into Republican Party coffers, third only to Amway and Philip Morris.) In 1996, with Gingrich's support, an initiative exempting money in MSAs from taxes became law.

The initiative progressed slowly, at first, because employers weren't all that enthusiastic: Managed care was holding down costs just fine, and, given the tight competition for labor in the strong economy, companies didn't want to risk alienating employees with yet another massive benefits change. In addition, at the behest of Democrats and Clinton, the 1996 law had carefully circumscribed the growth of MSAs: Only individuals and small businesses could sign up. No more than 750,000 could be sold in any year. And the entire program would be up for review in a few years, at which point it might very well be canceled altogether.

All of that began to change in 2000, when Bush began to talk up the idea of health savings accounts during the presidential campaign. He seemed primarily interested in it as a

way to counter Al Gore's more ambitious plans to expand health care coverage through government programs, much as the Republicans of 1994 had gravitated to Goodman's plan as a way to defeat the Clinton health care plan. But the MSA concept was also consistent with Bush's "ownership" agenda, since it stressed greater personal stewardship of medical spending. In 2003, Bush and his Republican allies rechristened MSAs as HSAs, lifted the cap on enrollment, ended their temporary status, and tied them to even more generous tax breaks.

Employer attitudes were shifting, too. Managed care wasn't holding down costs anymore, and the economy had slackened, giving employers more leverage to impose benefit changes on their workers. As the business community began talking more about its need to limit its liability, large insurers—everybody from the modern Blue Cross plans to the giant national carriers, such as Aetna and Cigna—began rolling out HSA products to meet the demand. (UnitedHealth simply acquired Golden Rule, for which Rooney collected \$500 million.) Some 2.4 million people have now signed up for HSAs and similar forms of coverage, according to the latest estimates by the Kaiser Family Foundation. By 2010, consumers are likely to have amassed between \$10 billion and \$26 billion in HSAs, according to a recent *Wall Street Journal* article.

HSA ENTHUSIASTS FREQUENTLY describe the accounts as the key to ushering in an era of "consumer-driven health care." As they see it, traditional insurance has numbed patients to quality as well as costs. HSAs, by contrast, would encourage them to act like real consumers: seeking out the most effective treatments, the most qualified doctors, and the best-run hospitals. Similarly, once consumers realize how much medical treatment can cost, they'll get more serious about healthy living—just to avoid the bills. "We're going to re-center the system on the individual," Gingrich said in a speech last year. "I want to capture you before you're a patient and make sure that you have the right devices at home, you're taking the right medication to avoid getting sick, you have the right supplements, you're eating the right food, you're doing the right exercise."

Pretty much everybody would like to see consumers become more informed about their medical care and develop healthier lifestyles. But will HSAs really accomplish that? There's reason to wonder. Consumers need good information in order for a market to work. And good information on health care is just not that easy to find. Within the federal government, the Centers for Medicare and Medicaid Services recently began publishing information on hospital quality, in the hopes of steering beneficiaries to the best providers. But, while a few basic criteria are helpful in drawing narrow judgments—generally speaking, you want to get a surgical procedure at a hospital that does a large quantity of them—others can be grossly misleading. Does a high mortality rate suggest a hospital has lousy

staff? Or does it mean the hospital simply takes on the most difficult cases?

Even some fans of the health savings approach wonder about the ability of patients with limited medical knowledge to make smart decisions about care, particularly since comparison shopping among hospitals can be difficult when you're dealing with an urgent medical situation. "[A]sking consumers to 'drive their health plans,'" one HSA promoter, who happens to be a physician, wrote earlier this year in an op-ed, "is like asking blind people to become NASCAR drivers."

To their credit, some HSA advocates have campaigned hard to improve the publicly available information about medical care, even if it takes the strong arm of the government to do it. But, no matter how much information consumers have, who's to say they will make good decisions? Many experts worry that, by giving patients so much incentive to be thrifty, HSAs will encourage them to scrimp on routine or preventative care—thus increasing the likelihood of large medical bills later. At the same time, they say, they're dubious that the prospect of eventually building up a fat HSA balance will somehow convince people to live healthier lives now. "How rational do you think people are?" asks David Cutler, a Harvard economist and author of *Your Money or Your Life*. "Think about it this way: The biggest cost of having a heart attack or cancer isn't the financial one. It's the probability that you die. ... There's still a lot of incentive to do the right thing. And yet people don't."

Figuring out whether HSAs will end up making people healthier is ultimately a matter of conjecture. The same cannot be said for its impact on the way the financial burden of medical care falls on different parts of the population. Health care operates by what economists commonly call an "80/20" rule. In any given year, most of the money being spent on medical care in the United States (about 80 percent of the total) is for the relatively small portion of Americans (about 20 percent of the population) recovering from severe accidents, fighting off a life-threatening disease like cancer, or struggling with a serious chronic condition like diabetes.

It's really no different from the situation the Committee on Cost described in the early '30s, except that, now, traditional health insurance spreads the financial burden, using premiums paid by people who don't use many medical services to help pay the bills of those who do. The trouble with HSAs is that they change the equation, dramatically, allowing people in relatively good health to keep much more of their own money. "One hundred percent of the time it makes sense for a healthy person to take the savings account," one benefits consultant explained in *The Tampa Tribune*. "That's a no-brainer." But, once that happens, there's less money to subsidize care for the people with high medical bills—which means those people must either make up the difference themselves or simply go without care. "A wholesale switch to [HSAs] would redistribute the

nation's overall financial burden of health care from the budgets of chronically healthy families to those of chronically ill families," Princeton economist Uwe Reinhardt has written. "One should simply not brush these ethical issues aside." (To see what happened when South Africa tried consumer-driven health care, see David Adler, "Medical Error," page 16.)

In their defense, HSA enthusiasts point out that people with serious medical problems are free to stick with traditional insurance. But, by luring healthy people and their premiums away from traditional insurance, HSAs would still drain money from the existing system, leaving the unhealthy to make up the cost. And, sure enough, it's healthy people who seem to be rushing into HSAs the fastest. When Humana Inc. began offering HSAs to its workforce in 2001, the employees who chose it were "significantly healthier on every dimension measured," according to a study published last year in the journal *Health Services Research*. And the anecdotal evidence certainly backs that up. Articles quoting enthusiastic HSA enrollees, which seem to appear in some local newspaper almost every day now, inevitably feature people like the 20-year-old worker at a Seattle drive-in restaurant who recently told the *Seattle Post-Intelligencer*, "If you're a pretty healthy individual, and you don't need to go to the doctor or expect that something might happen, it's a good plan."

BACK IN KNOX County, Rex Delph grasped the implications for people like him. And so, it turns out, did most of his co-workers. The vast majority of employees who responded to the survey opposed the change. "Please consider keeping the insurance we have," one school worker wrote. "Even though the County has a cheaper monthly plan, the out of pocket expense is way out of line for the amount I bring home in my monthly paycheck." Other employees were even more direct: "We make the least salary and can't afford these high deductibles out of pocket. ... Being a widow, if I have a major illness, I will not be able to go to the hospital. Please don't change us, I beg you!" In the end, the county listened and did not change the insurance after all.

Of course, most companies don't have to deal with the state regulations (and strong unions) that school boards do. If they want to impose changes in benefits, they'll find a way. But maybe that's not such a bad thing. Pressing employers to keep bearing an ever-larger financial burden on behalf of their workers really does punish them financially—and, contrary to the rhetoric of some critics, in ways that affect more than simply executives and shareholders. In the public sector, it drains budgets and diverts money from other needs. Once officials at the Knox County school board decided to keep the present insurance benefits, they had to cut gifted and talented classes in their middle schools instead. In the private sector, it puts companies that provide good benefits at a competitive disadvantage. It was precisely this issue that sparked a massive strike of grocery workers in California

two years ago. With the threat of competition from Wal-Mart, a company that provides relatively low benefits, the established supermarkets in California felt they had to cut benefits, too, or end up with debilitating labor costs.

Eventually, employers are going to find some way out from under the burden of employee insurance, if not by reducing benefits then by offering coverage to fewer workers. (Either that, or—like the U.S. auto industry, which has struggled with the cost of maintaining generous benefits it guaranteed years ago—they are going to risk bankruptcy.) So perhaps the best response to the erosion of job-based insurance is to admit that it's obsolete and come up with an alternative, one that remains faithful to the idea of shared responsibility for medical hardship that Bush and the conservative movement seem so determined to jettison.

After all, not only is the idea of sharing responsibility for health care costs a part of our history, it reflects the attitudes of most Americans today. Polls have shown Americans are in no rush to expose themselves to greater financial risk; on the contrary, whether it's Social Security or health insurance, they seem to prefer greater protection. Unlike the Bush administration, they have the imagination to envision the devastating changes of fortune—a chronically ill spouse or child, for example—that make a communal system not only the right thing to do but also in their own self-interest.

This is why we need to go back to the guiding principle of group health care—that the way to both lower costs and serve as many Americans as possible is to broaden, rather than shrink, the patient pool. One way to do this is through the plan we've been flirting with since the Progressive era—universal health coverage. These days, the case for it seems stronger than ever. Depending on how it's structured, universal health care would either limit or eliminate altogether the employers' responsibility for their workers' health bills, by transferring greater financial responsibility to an even broader base: the entire population, through some combination of taxes and premiums. And it could have modest co-payments and deductibles—large enough to deter moral hazard but not so large that individuals face financial ruin.

This isn't to say universal health insurance makes the trade-offs between cost, access, and quality disappear. On the contrary, it would force a more explicit, inevitably uncomfortable, discussion of how much Americans are willing to pay for basic health care—and what kind of services they would have a right to expect in exchange for that money. It would undoubtedly put more pressure on the medical industry and health care professionals to actually cut their prices, resulting in less income for both. And, finally, it would mean a redistribution of health care money from the wealthy to the poor, because the more expensive medicine gets, the more even modest cost-sharing would expose these people to severe financial hardship. Many of those ideas are anathema to the conservatives. But, if the people of Knox County are indicative, the majority of Americans may disagree. ■

BOOKS & THE ARTS

STANLEY KAUFFMANN ON FILMS Actualities and Miracles

WHAT A WELCOME SURPRISE. *NINE LIVES* is a title that arouses suspicion: we feel that somebody thought it was nifty and then had to cook up a script to go with it. Wrong. Rewardingly wrong. This film, written and directed by Rodrigo García, is composed of nine vignettes that are percipient and moving, in a general key of truth, and are presented in this multiple form because it is this artist's way to completion. García wanted to paint a canvas of nine elements, rather than one large element; and, though only a few of the vignettes are related, the film leaves us with a sense of wholeness, not of stunt. García could not hope to cover much of contemporary life, but with sharp, well-articulated incidents, he has fashioned a small conspectus of some of the losses, the peaks, and the oddly sustaining dailiness of modern life.

His view of his material suggests Raymond Carver. The characters in these sketches are borne to extremities, not by huge cataclysms of dramatic action but by the conjunction of matters in everyday life. Each sketch is titled with a woman's name. In the first one, Sandra (Elpidia Carrillo), a prisoner in a Los Angeles jail, has a meeting scheduled with her young daughter who is on the other side of a glass panel with a telephone connection. But the phone doesn't work; and Sandra's rage and disappointment at the loss of what her drab day was leading to is enough to define her life and possibilities. In the next vignette, Diana (the gifted Robin Wright Penn), married and pregnant, is wheeling her shopping cart through a supermarket when she meets a lover whom she hasn't seen in years, who is in the neighborhood

only briefly, and who was very much more than an incident in her life. Penn, in a sort of gavotte in the aisles as she moves away from him and back, conveys that, though she is well married and eager for her child, a whole vibrant segment of her life has suddenly glowed for her. Regret, reconciliation, and acceptance of the very shape of being are all in her lovely performance.

NINE LIVES
(Magnolia)

USHPIZIN
(Picturehouse)

Of the other seven sketches, empathic and keen-eyed all, I note only two. In a hospital room Camille (Kathy Baker) is being prepared for mastectomy. Her husband (Joe Mantegna) is with her.

There is no drama, no action of any kind other than the preparations. The scene is filled with the atmosphere of a long and reasonably pleasant marriage that she fears will now be marred. He attempts to re-assure her. No sentiment, not a soft word—at least not on her part; but the scene is crammed with fear, less of death than of loss. Not physical loss.

The last vignette takes place in a cemetery. Maggie (Glenn Close) has a small daughter, and they walk past grave-stones to a particular plot where they spread a cloth and have a picnic. We never learn who the deceased is, though it seems fair to assume that it is the husband-father. Evidently Maggie and her child have done this before because they never refer to what they are doing, they just do it. When the talk begins to slip slightly into mush, García saves it. The little girl has to pee, and Maggie sends her behind a tree after handing her a Kleenex. This touch of the mundane is exactly what was needed to keep the scene from being a "scene."

García, who is the son of Gabriel García Márquez, is much experienced in film and television. It is really cheering to see how well he works with actors, how,

like a good conductor, he has brought his players to perfect pitch. Something else is clear. He is confident enough as a director to break rules when he needs to. We are told that the film was shot in nine ten- to twelve-minute Steadicam shots. I thought I saw a touch or two of editing, and an editor is given credit. Still, the shooting of the film has a flow that ignores convention. When Diana and her ex-lover meet in the supermarket, García lets them face each other and talk and react without the close-ups and reverse shots that are supposed to be obligatory. When a young woman is waiting for a man in a house where she used to live, García lets her wander around the yard for a minute, just visiting spots she once knew. When the little girl goes to pee, we wait for her with her mother. In other films these moments might seem lax, but García has woven them into the unabashed simplicity that he establishes early and that becomes important to us.

USHPIZIN, we are told, roughly translates from the Aramaic as "holy guests." In this Israeli film, the title has both an ironic and an ultimately devout meaning. The feeling of the picture is of a tale recounted by a storyteller to show that, though orthodox Jews encounter difficulties that other Jews can avoid, they are at the last re-paid. Such a theme is what tales are for. But the picture has enough good feeling and chuckle to take it out of the parochial.

Moshe, a Hasid, lives in the (so-called) religious quarter of Jerusalem. He is played by a stalwart actor named Shuli Rand, who also wrote the screenplay. Moshe's wife, Malli, is played by Michal Bat Sheva Rand (in fact Mrs. Rand). They are childless. They are also broke. No clue is given as to what Moshe did or does for a living, but he prays for a miracle, and it happens. Money is shoved under their door. (We see why it happens, and, yes, it can be called, by those interested, a miracle.) Now Moshe is able to build and furnish a sukkah in the street outside, a temporary dwelling needed for the holiday of Sukkoth.

Two guests arrive. They happen to be two cons, on a kind of furlough from jail

who are breaking the rules of their fur-
lough, planning to escape. One of these
cons knew Moshe in his earlier life be-
fore he became so religious. Moshe, with
his wife, has to welcome the guests, an
article of faith at any time, especially
during the holiday. The cons, with shaved
heads and faces, behave in crude ways
that put their hosts to considerable tests
of patience.

Further troubles develop, not all of
them connected with the cons, and
Moshe's faith is strenuously tested. At

one point, for good reason, Malli bundles
up her things and leaves. But the finish of
the film satisfies all those who deserve it.
Jerusalem, we infer, is very much part of
God's precinct.

I missed the music. Music occurs in
the film from time to time, but it doesn't
suffice. I felt I was watching the libretto
of a pleasant little opera, being tested
while the score was being written. That,
however, is not quite fair to Gidi Dar's
directing, which, far from the tentative, is
affectionate and firm. ■

walked gallantly on stage and took Fon-
teyn's arm. They danced into the wings
doing Ashton's signature "Fred step," an
enchainement of small, finely linked *pas*
derived from a dance by Anna Pavlova,
which he was known to weave into many
of his ballets. The audience was so over-
come with the performance that Fonteyn
had to repeat her dance a second time.

In no other country would one en-
counter such personal tributes on the
ballet stage, with audiences expected to
recognize fleeting allusions to an entire
repertory, complete with inside jokes.
Indeed, these were not so much tributes
as family portraits: "Sir Fred" and "Dame
Margot" were drawing on a commonly
shared sense that ballet, perhaps more
than any other art form, was wrapped
up with the history and the identity of
modern England. It came of age through
two world wars, the Depression, and the
emergence of the social democratic state:
Ashton's ballets and Fonteyn's dancing
seemed to hold a mirror to some of the
best qualities of British national charac-
ter as it emerged in those years. Ashton's
enduring iconic stature may owe as much
to this national history as it does to time-
less art.

JENNIFER HOMANS ON DANCE England On Pointe

THE BRITISH SIMPLY ADORE Frederick Ashton. For near-
ly three hundred years, Brit-
ain lacked an indigenous
ballet tradition and depend-
ed, sometimes resentfully, on French,
Italian, and Russian "invaders" for the
art of dance. Ashton changed all that.
Working in London for
more than fifty years, from
1926 until his death in 1988,
he helped to build the
Royal Ballet from a motley
group of dedicated but
half-trained dancers into a
world-class troupe. By the
time he retired in 1970,
Ashton had endowed the company with
a significant repertory that defined—for
the first time—a distinct and enduring
"English style" of ballet. And not only
that: he developed this national style
with Britain's most beloved ballerina,
Margot Fonteyn, with whom he worked
from 1934. His ballets refined her danc-
ing and catapulted her to world fame.

This year the Royal Ballet is celebrat-
ing Ashton's one hundredth birthday
with an ambitious yearlong program in-
cluding significant new reconstructions
and old favorites. Though many ballets
are missing, this is probably as close as we
shall ever come to an Ashton retrospec-
tive. What it reveals, however, may not
be what the Royal Ballet intended. If the
current performances show that Ashton
was capable of great lyricism and charm,
they also reveal significant lapses. Many

of his works now appear trivial and
dated. And there has been little effort
to make this an occasion for the critical
re-evaluation of Ashton's oeuvre: the
London public cheers everything, and the
current director of the company, Monica
Mason, a former dancer, has won near
universal respect in large measure for the
care that she has lavished on Ashton's
legacy. So why do British
audiences love Ashton so
unconditionally? What do
they see that I do not?

It may help to recall
that this is not the first trib-
ute the Royal Ballet has
paid to Ashton. On the
occasion of his retirement

thirty-five years ago, the company staged
an extraordinary farewell performance;
not the usual formal tribute with flowers
and ovations, but a more intimate affair.
Fragments from early Ashton ballets
were performed, and photos of his youth
projected onto a large screen. At the
end Robert Helpmann, a dancer who
had worked closely with Ashton, recited
a Gertrude Stein poem from Ashton's
1937 ballet *A Wedding Bouquet*. As
Helpmann intoned "only one," Ashton
descended on a chair lift from the top
of the stage, like a god from the clouds.

Nine years later, Ashton himself paid
homage to Fonteyn. *Salut d'amour à
Margot Fonteyn*, to nostalgia-tinged mu-
sic by Elgar, was a short solo danced by
the sixty-year-old Fonteyn that threaded
gestures from "her" Ashton ballets into
a seamless dance. At the end, Ashton

THE STORY BEGINS WITH THE
"invasion" of Diaghilev's *Bal-
lets Russes* and the figure of
John Maynard Keynes. Born
in 1883, Keynes never forgot the idyllic
gentlemanly life of his early years in
Edwardian England, devoted to the pur-
suit of knowledge and art. Educated at
Eton, he went on to King's College, Cam-
bridge and was inducted into the vaunted
Apostles, a secret society of intellectuals,
many of whom, like Keynes, went on to
become Bloomsbury's leading lights.
With them, Keynes rebelled against the
Victorian ethic that demanded of indi-
viduals that they sacrifice their deepest
feelings and desires on the altar of social
duty and what he dismissed as a "love for
money." Indeed, Keynes led the way in
formulating a serious philosophical de-
fense of the "good" inner states achieved
through intellectual rigor, beauty, love—
and homosexuality: what the Apostles
fondly called the "Higher Sodomy." This
was no decadent indulgence, but an au-
thentic emotional reaction bound up
with an intense desire to forge a new and
cultured aristocracy freed from the stuffy
conventions of the past.

These intellectual and personal pur-
suits converged in part on the *Ballets*

THE ROYAL BALLET
ASHTON 100
CELEBRATIONS
(Covent Garden
Opera House)

Russes, with its vivid sexuality (exemplified by Nijinsky), artistic daring, and aristocratic heritage. For Keynes, especially in the wake of World War I, ballet became an increasingly important symbol of the lost civilization of his youth. In 1921 he was overcome by Diaghilev's production of *The Sleeping Princess* and in 1925 he married one of its stars, the Russian ballerina Lydia Lopokova. Later, as Britain sank into the Depression, his aesthetic ideals took on an increasingly political edge: "With what we have spent on the dole in England since the war" he wrote in 1933, "we could have made our cities the greatest works of man in the world."

Keynes plowed much of his talent and resources into theater, painting, and dance, developing the Arts Theater in Cambridge and sponsoring the Camargo Society, a predecessor of the Royal Ballet which produced many of Ashton's early works. By 1942 he was chairman of the Council for the Encouragement of Music and the Arts (CEMA), which became the Arts Council of Great Britain in 1946, shortly after his untimely death. Uncompromisingly highbrow, Keynes disdained amateur art and insisted that state support should go to professionals whose rigorous standards would feed the growing demand for "serious and fine entertainment," never ceding to popular taste. It was a characteristically ambitious vision. He wanted nothing less than to make London the cultural capital of Europe.

Ballet was an important part of Keynes's plan. In 1946 he arranged for the Sadler's Wells Ballet to become the resident company at The Royal Opera House at Covent Garden. The theater had been converted to a dance hall during the war, but after a series of negotiations spearheaded by Keynes it was restored to its former grandeur. For the opening gala performance that year, the company danced *The Sleeping Beauty* with lavish sets and costumes by Oliver Messel. The performance, attended by the royal family, Prime Minister Clement Attlee, and the full Cabinet, was widely seen as a metaphor for Britain's awakening after the horrors of two world wars. As Keynes

himself explained, "many people had come to fear in their hearts . . . that all the grace and elegant things from the old world had passed permanently away, and it caused an extraordinary feeling of uplift when it was suddenly appreciated that perhaps they had not entirely vanished."

The Sadler's Wells Ballet, in which Keynes had invested such hope, was the brainchild of Ninette de Valois and a group of dedicated artists, including Frederick Ashton and Margot Fonteyn. Ninette de Valois, born Edris Stannus in



Frederick Ashton and Margot Fonteyn in "Façade," 1940

1898, shared some of Keynes's nostalgia for a rose-tinted Edwardian era—in her case, for the happy, languid childhood days on her parents' estate in rural Ireland. When she was seven, financial constraints forced a family move to England where she stayed with her Victorian grandmother, later joining her mother in London. She studied "fancy dancing" at the Edwardian School of Deportment with Mrs. Wordsworth, who taught in a black silk gown and white kid gloves. She took ballet at the Lila Field Academy for Children and joined the "Wonder Children." She saw Pavlova's *Dying*

Swan and performed it from memory "on every old pier theater in England." She made her professional debut on the music hall stage in 1914, in the shadow of war.

De Valois, whose father was killed at the Somme, volunteered at a military hospital and the Victoria Station soldiers' canteen; and she continued to perform and study ballet avidly. After the war, she worked with Russian émigré artists who had come to London with Diaghilev, including Nikolai Legat, Léonide Massine, Lydia Lopokova, and the Italian master Enrico Cecchetti. Like Keynes, she saw *The Sleeping Beauty* in 1921, and two years later she joined Diaghilev's company in Paris. It was a decisive experience, but not because of his purported experimental edge: for de Valois, Diaghilev was first and foremost "a mind of great culture, with its disciplined background of the orthodox." Henceforth she would be a tireless advocate of the strict rigor and high ideals of classical ballet.

Yet she was not interested only in ballet. As a choreographer in the 1920s, de Valois was taken up with the repertory theater movement. She worked at the Festival Theater in Cambridge, which sought to escape the predictable parlor-room realism of the West End and create a "producer's theater" that prized artifice and drew on Central European expressionism. She also collaborated extensively with Yeats in his efforts to create a national theater at the Abbey Theater in Ireland, and with Lillian Baylis in her struggle to bring theater to "the people" at the Old Vic, located behind London's Waterloo Station. De Valois's own choreography often veered toward a weighty, expressionist vocabulary: bare feet, angular arms, constructivist groupings.

Yet Diaghilev's "habitual love of ritual and tradition" remained with her, and she determined to build a national repertory ballet grounded in the Russian Imperial classics. Like Keynes, she saw ballet as a beacon, with standards "high to the point of idealism" and no concessions made to the "vast armies of 'nomadic' theater-goers" or sentimental "bric-à-brac aesthetic." Serious and

The Arab-Israeli Conflict

Is it the "root cause" of unending war and of terror?

There are many who are convinced that the existence of Israel and its "alien" presence in the predominantly Moslem Middle East is the "root cause" of the ongoing and never-ending violence in the area and of terror in the world. And that if it were not for Israel, peace would prevail and terror would cease. That premise is assiduously advocated by the Arab and Moslem nations.

What are the facts?

Israel is a tiny country, with only six million inhabitants (a million of whom are Arabs). It is surrounded by 22 Arab countries, with 300 million people. Their combined land area is greater than that of all of Europe. Despite this disparity in size and population, Arab propaganda has convinced the world, even many well-meaning people in the United States, that Israel is the mighty Goliath compared to the puny Arab states. It is a supreme irony that six million Israelis, surrounded by implacable enemies who are fixated on their destruction, are considered a mortal danger to the Arabs and perhaps even to the peace of the world. And that if it were not for the Jews, were it not for Israel, peace would descend and terror would cease.

Israel, despite constant propaganda to the contrary, is not the "root cause" of this strife and turmoil in the Middle East. Violence and war are endemic in Arab society and in Arab history. Israel was not involved in the deaths of the millions who died in the Iraq-Iran war. Arab-Moslems killed over a million black Christians and animists in the Sudan and brought intolerable suffering to that impoverished region. The Sudanese government, dominated by Arab-Moslems, didn't lift a finger to help its citizens. Israel is certainly not involved in that. The thousands whom Hafez Assad, the father of the current president of Syria, slaughtered in the city of Hama have no connection with Israel. Abdal Gamel Nasser, the self-appointed president of Egypt, mortal enemy of Israel and instigator of the Six-Day War, did not invade Yemen and gassed its people because of Israel. Saddam Hussein did not torture and kill tens of thousands of his own people and did not invade Kuwait because of Israel. The Lebanese did not stage their civil war and kill thousands of their own because of Israel. And there are many more examples of intra-Moslem or intra-Arab slaughter and mayhem. Israel was uninvolved in any of those. All of this would have taken place if Israel had never existed.

The proclivity to war and to terror on the part of the Arab-Moslems has nothing or little to do with Israel. It is the result of their culture and of their history. It is a symptom of a crisis of identity and of confidence. For centuries, the historical Moslem empires of the Middle East were confident societies, which long led the despised Christian West in terms of science and economic well-being, as well as in military power. But then a lasting reversal and decline set in, in which the loss of Spain and the ascent of the West and its towering achievements in every human endeavor played a key role. This thirst for war against each other and against the hated infidels – foremost among them the Israelis – and the lust for terror will not end until Arab-Moslems come to terms with the West and accept its predominant role. But that may take a very long time – in fact, it may never happen.

And how about terror? Again, many believe that Israel is the "root cause" of the terror that Arab-Moslems have visited and continue to visit upon the world. The attack on the United States on September 11, 2001, the destruction of the two U.S. embassies in West Africa, the bombing of trains in Spain, the murderous attacks on the London subway system, and so many other acts of cowardly terror would have taken place even if

there were no Israel. And, many believe that if only the United States would withhold its support from Israel (and get out of Iraq), terror would cease and the world would no longer have to fear the scourge of suicide bombings, the

devilish invention that Arab-Moslems have visited upon the people of the earth.

Many claim that Arab-Moslem terror is the result of despair, hopelessness, and poverty. But that is patently absurd. The Arabs are some of the richest people in the world, although, instead of using their enormous wealth to benefit their people, they squander it in bizarre luxury excesses for a privileged few. It is obvious nonsense that Arab-Moslem terror is the result of poverty. The nineteen hijackers were not poor or desperate. They were, without exception, well-educated people, members of upper-middle-class families. The leaders of such Arab-Moslem terror organizations as Hamas, Hezbollah or Islamic Jihad are educated people, from the upper reaches of their societies. And if hopelessness, deprivation of their "national rights," and poverty would give rise to terror, how come that, even in the worst and most evil days of Jim Crow, American Negroes never engaged in systematic terror against their white fellow citizens? How come Tibetans don't use terror against their Chinese overlords? How come the sub-Saharanans of Sudan and other countries of Africa do not use terror against their Arab-Moslem oppressors? No, terror is the customary response of Arab-Moslems to express their grievances. It is a result of their culture and of their history. It has nothing to do with Israel and would not be any different if Israel had never existed.

"...the lust for terror will not end until Arab-Moslems come to terms with the West and accept its predominant role."

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exacting of character, de Valois wasted little time. In 1926, she opened The Academy of Choreographic Art, and proposed to Baylis that she form a national ballet company attached to the Old Vic. In 1931 the Vic-Wells Opera Ballet gave its first full evening of ballet; shortly thereafter, the troupe took the name Sadler's Wells Ballet, and in 1956 it became The Royal Ballet. De Valois remained at the helm until 1963, and upon her retirement turned the company over to her longtime collaborator, Frederick Ashton.

A CHILD OF THE BRITISH Imperial diaspora, Ashton was born in Ecuador in 1904 and raised mostly in Peru. He was the product of a strict Edwardian upbringing, albeit softened by Peruvian warmth and long summers on the beach. His father, a cold and troubled man, was a carpenter's son who had risen into the middle class to become a British diplomat and businessman. His mother, an aspiring socialite, was taken up with the parties and entertainments appropriate (as she saw it) to the life of a proper Edwardian lady. Ashton watched. In retrospect, he would be fascinated by the fading world of his childhood.

He recalled seeing King Edward VII and Queen Alexandra in the royal coach during a family trip to London, and remembered his parents' dinner guests with their "enormous hats and tango shoes ... wonderful gestures and photogenic attitudes." He saw Anna Pavlova perform in 1917 and was drawn to her old-world manners: how she wrapped her sable stole, her posture and gait—which he would experience again as an adult when he studied her hands as she served him tea carefully stirred with spoonfuls of sweet jam scooped from "hundreds" of little Russian pots.

Academically weak, Ashton failed to get into the right English boarding schools and was shipped off to Dover College in Kent, arriving in 1919 to inherit what Ezra Pound memorably called that "botched civilization." There

he languished, despising the public school ethos of enforced sports and stifling convention but finding some relief in poignant homosexual encounters—and excursions to London theater. When his father committed suicide in 1924, plunging the family into emotional and financial distress, Ashton took refuge in ballet.

He studied with the Russian choreographer Léonide Massine and danced on the music hall circuit. Like so many others of his generation, he also plunged headlong into the *recherché* party life hauntingly depicted in Waugh's *Vile Bodies*. A witty and talented impersonator, he regaled London's social and artistic elite with hilariously irreverent evocations of Sarah Bernhardt, Anna Pavlova, and Britain's queens (in what he called "fifty years a Queen," he pretended to be Victoria wrapped in a black kimono with a powder puff for a hat). Many of the artists he met became his collaborators: composers such as Constant Lambert and Lord Berners; the photographer and designer Cecil Beaton (in 1939, Ashton posed as the "Grand Duchess Marie-Petroushka" for Beaton's satirical *My Royal Past*); Edith and Osbert Sitwell; and de Valois, Lopokova, and Keynes.

Though he began dancing at the late age of twenty, Ashton worked in London and Paris with many of the émigré artists of the Russian Imperial ballet who had also taught de Valois, including Nikolai Legat and Bronislava Nijinska. He, too, admired the Russian dancers' "superhuman" discipline. Yet his relationship to classical ballet was more complicated than Keynes's or de Valois's. It was mixed with great uncertainties that had to do with his late and piecemeal training, but also with his character, his generation, and his biography. He had grown up on the edge: of the middle class, of the Edwardian era, of the Eton-Oxbridge universe, of the ballet. The traditions that he inherited were disrupted and partial, if not "botched." Lacking Keynes's confidence and de Valois's backbone, he shared his generation's taste for satire and a yearning for the world destroyed by Britain's "old men." Yet he was never quite settled or rooted in anything.

All of this made Ashton's role as a classical choreographer less straightforward than is sometimes portrayed. He was never interested in building a school or in codifying a technique (de Valois tended to those things), and he never tired of explaining his immense debt to

Anna Pavlova and Isadora Duncan. Yet Pavlova and Duncan were iconoclasts whose success depended largely on personal magnetism rather than classical technique or form. Ashton, too, was an iconoclast: his style is characterized by fleeting footwork and fast arpeggios of steps skimming the floor. Even in his most lyrical passages, the dancers barely alight in one position before gliding into the next, as if running full tilt through the classical lexicon, reluctant to take its full measure. Ashton's choreography tends to extended, breathless phrases filled with Isadora-like flourishes and feints, barely controlled by conventional grammar. Known for working with gestures and rushes of dramatically tinged movement, which sent him flying across the studio, he would then turn to the dancers and say, "now, what did I do?" In sum, Ashton backed his way into classicism, often pressing ballet into the service of impersonation and his own acute observations of social manners and codes. This led him to a unique and subtle but (as we shall see) highly perishable idiom.

MARGOT FONTEYN, BY CONTRAST, exemplified strict classical form. Born Margaret Evelyn Hookham in 1919, Fonteyn was trained by Russian émigrés in London and Shanghai, where her father was sent for business. When she came of age in the 1930s, she quickly made a name for herself in de Valois's company and danced in many of Ashton's early ballets. Her real breakthrough came during World War II, when a rump troupe drawn from the Sadler's Wells Ballet toured London and the provinces. Fonteyn danced with them for the troops and the people, in theaters and parks, through the Blitz and the doodle-bug bombs. Performance times were adjusted to curfews: there were Lunch, Tea, and Sherry Ballets, and Fonteyn was known to give as many as six performances a day. She did *Giselle*, *Swan Lake*, and *Les Sylphides*, as well as contemporary works. In 1940, in Ashton's *Dante Sonata*, Fonteyn (partnered by Michael Somes) portrayed the forces of good in a confrontation with evil (Robert Helpmann with June Brae). With its sentimental theme and Isadora Duncan-style movement—barefoot dancers borne aloft as if nailed to a cross—*Dante Sonata* was one of the company's most popular wartime offerings.

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Fonteyn's fame grew. She was universally admired for the beauty of her dancing, but also for her steadfastness and courage. Like the queen, she never flinched at the bombs nor fled the capital city; yet she was also "one of us," her girlish face wrapped in a scarf peering out from under countless adoring headlines: "Margot, the ballerina." As a sign of her enhanced wartime stature, Fonteyn's photo was mounted in the officers' wardrooms of at least one naval battleship.

Watching films and studying photos of her early dancing, one can see why. Physically, Fonteyn was delicate and beautifully proportioned, not naturally strong or muscular. Yet when she danced her back was a rampart, ramrod straight and perfectly aligned, and her balances on one toe were a still-point that never wavered. Her line was pure and un-ornamented: she did not arrange her fingers in what the Russian ballerina Alexandra Danilova called "flowers, not cauliflowers," but extended them instead in a long and tapered line, Ionic rather than Corinthian. It was as if she had removed the jewelry from the Russian aristocratic tradition: entirely without pretense, she had made herself a dancer of the people.

By 1946, when Fonteyn and Helpmann danced *The Sleeping Beauty* originally staged by Nicholas Sergeyev "after Petipa" with new additions by Ashton and de Valois, at Keynes's newly opened Covent Garden Opera House, the pieces had all come together: ballet stood firmly at the center of British public life. "Ballet-going, since the war," reported one journal later that year, "has become one of this nation's new habits, like (and generally involving) queuing, or Spam." As if to emphasize the point, in 1948 Michael Powell and Emeric Pressburger made *The Red Shoes*, the first blockbuster ballet film. Starring Fonteyn's colleague (and competitor) Moira Shearer, the film tells of a beautiful young English ballerina who sacrifices love and life for ballet. As Powell later put it, "during the war we were all told to go out and die for freedom and democracy. After the war *The Red Shoes* told them to die for art."

ASHTON'S OWN POSITION WAS secured with *Symphonic Variations*, which premiered in 1946 with music by Fauré and designs by Sophie Fedorovitch. The ballet has no story, and is often taken to be

Ancient Rome

The doge wipes his fingers in a slave's hair
Through cypress, sounds of a hot spring refilling
Many hands tremble at the labrador's back
The peddlers fear when the emperor's near

Fear eats the seawall alive
Fifty shopgirls fathom utter death
Gorgon in the fountain makes us mostly into art
A houseboat sings *I'm stunning inside*

Below the staircase the doge and I talk
Of a terrific wake on some ochre ducks
Camels plan their reappearance and arrest

The streak of blood that trails a bass
Help the passels of felons get
and the way
Dear at night our pores and fears pair off

JAMES CAPOZZI

Ashton's testament to the power of neo-classical "abstract" dance. And indeed, its pared-down lyricism stood in sharp contrast to another ballet presented on the same program, Helpmann's wildly expressionistic *Adam's Zero*, which depicted bombing raids, a city in flames, and a concentration camp.

Helpmann's work cut too close to the memory of war and fell out of repertory, whereas Ashton's ballet was widely acclaimed. And not only because it was "dance for dance's sake": the ballet had a message and a style that remains clear today. It is the only ballet I know that calms. Ashton smoothes the rhythmic surface of Fauré's score, and the dancers carve seamless patterns through space, with extended lines and direct actions. It is shaped in one long and continuous phrase. There are no stars, no pyrotechnics, no witty impersonations—only a community of individuals joined in a clearly defined common pursuit. It is practically a social democratic ballet.

In October 1949, the Sadler's Wells performed *The Sleeping Beauty* in New York to enormous acclaim. At a moment when many in Britain were feeling small and squeezed, the company's success was symbolically freighted: here was a British company taking America by storm with a Russian ballet. Writing in anticipation of the premiere Richard Buckle reflected on Fonteyn's position: as she balances on one leg in the Rose

Adagio, he said, "she supports the honour and glory of our nation and empire on the point of one beautiful foot!" And so she did. There were twenty curtain calls.

II.

THIS KIND OF HISTORY does not easily fade from collective memory. In postwar Britain, ballet was recognized as a national art, a jewel in the (shrinking) British crown—and de Valois, Ashton, and Fonteyn were its justly celebrated leaders. Indeed, their work belonged to the larger Keynesian consensus that shaped British public life until Margaret Thatcher's "revolution" tore it apart in the 1980s. For several generations of British audiences, ballet was not only beautiful and enjoyable; it was also a passion rooted in their own sense of themselves as a people.

But this is no longer so, and hasn't been so for some time. Ashton's career came to a close during the Thatcher years, just as the ideas crystallized in his dances broke down. Today ballet has no special claim on the public imagination. If anything, it is an increasingly "elite" and exclusive form of art. There are no Ashtons or Fonteyns, no queuing and Spam; only pricey tickets and designer art. That Ashton is enjoying a renaissance today seems to me no accident. His resurgence is of a piece with other contemporary commemorations of Britain's pre-Thatcher "heritage"—a longing for the high ideals and common purpose central to British national identity in those critical years. But there is a problem: Ashton's ballets have lost their natural historical light. They simply do not make the same kind of sense today, no matter how much one sympathizes with the yearning to retrieve their memory.

Consider Ashton's one-act ballet *A Wedding Bouquet*, from 1937, with music and designs by Lord Berners and words by Gertrude Stein. It is a mocking portrayal of a country wedding, in which the guests include many of the bridegroom's former lovers. Among the colorful cast of characters we have the bridegroom (originally Robert Helpmann), a suave ladies' man; Julia (Fonteyn), a dark-haired, slightly crazed and saddened girl pulling nervously at her straggly hair;

Josephine (June Brae), an outrageous high-society lady whose pretensions dissolve into ridiculous hysterics as she becomes progressively soused; Webster (de Valois), a strict English maid scolding everyone; and Pépé, a skittering dog. Throughout, a narrator (originally a chorus) dressed in tails and sipping champagne recites fragmented verse in perfect BBC English, dripping with irony. The ostensible setting may have been French, but the characterizations were unmistakably English. A satirical portrait of the prewar British class system, *A Wedding Bouquet* works largely through inflected gesture parsed with dance: a series of impersonations writ large.

Today's dancers have little feel for the ballet's subtleties. Britain has changed, and so has the Royal Ballet. In the current production of *A Wedding Bouquet*, Zenaida Yanowsky's Josephine is all bombast; Anthony Dowell as the narrator reads his lines elegantly, but straight; Deirdre Chapman's maid is a dull cliché. Tamara Rojo's Julia is the only convincing portrayal—but as an outcast, she has no social identity to satirize. As one exasperated London critic lamented, "must it take the restoration of the class system to get Ashton properly performed?" The answer, unfortunately, may be yes. Yesterday's satire has become today's anachronism.

SURPRISINGLY, HOWEVER, THE weakest ballets in the Ashton Celebration have been those Ashton made for Fonteyn in the 1950s and early 1960s, including *Daphnis and Chloé*, *Ondine*, *Marguerite and Armand*, and a new re-construction of *Sylvia*, which was also performed by American Ballet Theatre this past spring. Watching these dances, it is difficult to understand what Ashton was doing: they are curiously shallow works of little choreographic value. It has been said, in Ashton's defense, that he knew how to bring out the best in Fonteyn and purposely gave her ample rein. No doubt. But without her there is nothing left.

Sylvia is probably the most troubling example. With a lush score by Delibes, it is a lumbering three-act confusion of gods and goddesses, sylphs, dryads, and naiads. The dancing veers between camp ensembles and Petipa-style combinations, as if stranded between English music hall and the Russian classicism that Ashton so admired. He himself thought the whole thing terribly flawed and re-

worked it several times before letting it lapse. Today's ballerinas appear understandably confused: perhaps Fonteyn knew how to tease out strains of satire and lyricism, but in the performances I saw neither Darcey Bussell nor Mariela Nuñez had a clue. Bussell danced it straight, which looked silly. Nuñez resorted to hamming up the choreography, but what else could she do?

In a different key, but equally dispiriting, is the one-act *Marguerite and Armand*, fashioned from Dumas's famous story of doomed love as a "vehicle" for Fonteyn and Nureyev in 1963, with sets and costumes by Beaton. In Fonteyn's time no other dancer performed her role, and today her part is the sole province of Sylvie Guillem, a French ballerina and Principal Guest Artist with the Royal Ballet. A pretentious melodrama, *Marguerite and Armand* consists of a series of half-baked gestures with very little dancing. It is one of Ashton's most self-indulgent exercises in theatrical posturing. To judge from films, Fonteyn and Nureyev used the ballet as a platform for their own sexually charged stage partnership, but Guillem feigns an ingénue—showing that without sex the ballet lacks substance.

THERE IS A STRIKING AND often overlooked lesson here: in these ballets Fonteyn carried Ashton, rather than the other way around. And it was not just Fonteyn: even *Rhapsody*, which was made for Baryshnikov, looks bland and dull today. Moreover, Ashton's best ballets were really the ones that he did without Fonteyn in a starring role. *Scènes de ballet*, created in 1948 to a score by Stravinsky, has a clean geometric design that allows the dancers fully to articulate Ashton's style: tiny close-stitched footwork, graciously bending bodies, all tightly contained in rhythmic and spatial designs. Fonteyn was in the original cast, but the hierarchies so typical of classical ballet are muted, and Ashton pulls all of the dancers alike into a tightly ordered scheme. Today the Royal Ballet performs the piece beautifully. In this global age, when dancers have little loyalty to anything but their own careers, this is no small achievement: the company has a strong sense of themselves as an ensemble—as they must if they are to recall the best of Ashton.

And the best of Ashton, without a doubt, is *La Fille mal gardée*. It pre-

miered in 1960 with a score by Hérald, freely adapted and arranged by John Lanchbery, and featured Nadia Nerina and David Blair—fine dancers unencumbered by world fame. *Fille* was a defensive move: Ashton was under direct attack from a new and "angry" generation, led by Kenneth MacMillan, a young choreographer and dancer who would replace Ashton as director of the Royal Ballet in 1970. Like John Osborne, whose *Look Back in Anger* shook the British theatrical establishment in 1956, MacMillan grew up in a family hard hit by the Depression and the war, and came of age with the H-bomb. As Kenneth Tynan explained, "How could they revere 'civilization as we know it' when at any moment it might be transformed into 'civilization as we knew it'?" These debilitating uncertainties were only exacerbated by the humiliating debacle at Suez in 1956, the end of Britain's postwar illusions.

MacMillan wanted to tear down what he took to be ballet's polite fairy-tale façade. In 1958 he created *The Burrow* for the Royal Ballet Touring Company, about police-state terrorism. In 1959, he worked with Osborne on a satirical musical, and in 1960 several months after the premiere of *Fille*, he presented *The Invitation* (once again with the Royal Ballet Touring Company) with a gruesome rape fully enacted on stage. De Valois supported his work, and indeed MacMillan's mix of classicism and weighted modern dance movements recalls her own (and Helpmann's) interest in a more expressionist and "theatrical" language. Too often, however, MacMillan dispensed with classical form in the name of ugly gestures and "realism," with devastating consequences for ballet.

Ashton would have none of it, and so he made *Fille*. "I was swept by a longing for the country of the late eighteenth and early nineteenth century" he wrote, "the country of today seems a poor noisy thing by comparison." Drawing on a French comic-ballet scenario from 1789, he wrote his own version of the story of the young peasant girl Lise and her widowed mother who promises her daughter's hand in marriage to the son of a wealthy man. Naturally, Lise loves someone else: Colas, a handsome local boy, and after a series of misadventures Lise manages to convince her mother to bless their love. This might have been a quaint sweet-nothing of a ballet, adding fuel to MacMillan's fire.

Instead it was a substantial work, albeit in a comic genre. Ashton's voice comes through in an unabashed affirmation of innocent love and pastoral ideals. Fittingly, he chose Osbert Lancaster to design the sets. Known for his satirical cartoons poking gentle fun at the foibles of the ruling class, Lancaster created a sunlit farmyard setting, complete with chickens who perform a silly but endearing chin-strutting act. There are ribbons galore: for cat's cradle, maypole dances, pony rides. The dancing is light and fluid, and altogether wonderful. Yet the heart of the ballet lies in its character roles. Alain, the rich man's son, is a daft but well meaning half-wit with a quirky bow-legged walk, pony stick, and bright red umbrella. The Widow Simone, played by a man in the tradition of a Pantomime Dame, is a comic portrait of a girlish old lady. At one point, "she" launches into a Lancashire clog dance, falling over her own feet in a virtuosic display that brings the house down.

Today's Royal Ballet performs *Fille* to perfection. Not because they have great ballerinas (it doesn't need one), but because they have a strong ensemble and superb comic dancers, who (like Ashton himself) pull as much from music hall—or Monty Python—as they do from ballet. William Tuckett as the Widow Simone gave a sweet, gawky, and nuanced performance. With a simple nod of the head or a too-eager twist of the body, he exposed a dozen human foibles and vain ambitions, all forgiven. This is a rare gift. In the American Ballet Theater production of the same ballet, the Widow Simone is wrongheadedly portrayed as a gay man in drag. This anachronistic Americanization doesn't work: *Fille* is a very English ballet.

And it was a beacon in its time. Fonteyn and Nureyev met the 1960s head-on with a potent mix of classicism, rockstardom, and sex. MacMillan continued his drive to a "more relevant" art. But Ashton fell back on the past: he made *The Dream* (from Shakespeare's *A Midsummer Night's Dream* and one of his best ballets) and mounted Nijinska's *Les Biches* and *Les Noces*, both from the 1920s. In 1968, he choreographed *Enigma Variations* to Elgar's lilting score. A nostalgic portrait of turn-of-the-century country life, the dances are sketched in light ink from gestures and fleeting thoughts. Choreographically slight, it leans heavily on Julia Trevelyan Oman's designs evoking a misty-eyed Victorian

twilight, and on Elgar's haunting phrases. Like *Fille*, the success of the ballet depends on the subtlety and skill of its character dancers, and today's Royal Ballet gives a convincing if sentimental performance: nostalgia twice removed.

AFTER RETIRING FROM THE Royal Ballet, Ashton retreated into an increasingly effete and artistically debilitating nostalgia that revolved around his beloved country house and his connections with the royal family. In 1970 he mounted *The Tales of Beatrix Potter*, and in 1976 he made *A Month in the Country*, a cross between *Enigma Variations* and *Marguerite and Armand*. In 1986, Ashton choreographed his last ballet, *Nursery Suite* (for the Royal Ballet School). It was another (and final) family portrait: the ballet depicted the ribbons-and-bows childhood of Princess Margaret and Queen Elizabeth.

If Ashton sank into a small and remote world in his final years, one can hardly blame him. The Britain he knew was gone, and he did not particularly like what had replaced it. But today's Royal

Ballet can afford no such luxury. The Ashton 100 Celebrations promised to put the company on a clear artistic course, re-establishing Ashton at the head of a great national tradition that could hold its own against stylistic globalization and Euro-art—but by lumping all of Ashton's ballets into a single purportedly great "heritage," the Royal Ballet has paradoxically undercut his legacy. A new generation would be well justified in pouring the same scorn on *Sylvia* or *Marguerite and Armand* that MacMillan poured on "fairy-tale" ballets in his own time. "Heritage," however popular, should not be confused with art.

The company's recent efforts to build on Ashton's legacy have been equally misguided. As part of the Ashton 100 Celebrations, the company presented a work by David Bintley, once wrongly touted by some as Ashton's successor. His *Tombeaux*, from 1993, to music by William Walton, is a glittering and arid exercise—ballet reduced to meaningless etiquette, a "high" art for expensive people. His most recent work for the company, *Les Saisons*—which I saw at its Royal Ballet premiere in 2003—is the

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Our program, one of the oldest and most prestigious in the nation, is small (no more than a dozen students admitted in any genre, with all workshops limited to twelve members); very intensive (the Master's degree is ordinarily awarded after the academic year of eight courses); and highly competitive (normally twenty-five students apply for each spot in fiction and poetry). We are best known for the quality of our graduate workshops. All of these are held in the same small room, which allows through its dusty windows a glimpse of the Charles River. Perhaps the most remarkable such workshop occurred when Sylvia Plath, Anne Sexton, and George Starbuck gathered for instruction by Robert Lowell—gathered, by the way, less often in that little room than at the Ritz Bar. These days, the poetry workshops are run by our regular faculty of Poet Laureate Robert Pinsky and Nobel Laureate Derek Walcott, who also conducts the playwriting workshops; and those in fiction are led by Leslie Epstein, Ha Jin, and distinguished visiting writers. Of course, our students have about them the resources of a great university. That means they often take courses with a superb faculty in literature that includes, besides the poets Geoffrey Hill and Rosanna Warren, the scholar Christopher Ricks and Boston University's other Nobel Prize winner Elie Wiesel. It is difficult to know how best to measure a student's success, or the worth of a program to a writer; we can say that our graduates in each genre have accomplished a good deal. Among numerous awards, our playwrights can list The Heideman Award, The Charles MacArthur Award for "Best New Play," and six national playwriting awards from the American College Theater Festival. Quite recently, our graduates in poetry have won the \$30,000 Whiting Award, the Barnard New Women Poets Series, a grant from the NEA, and the Norma Farber First Book Award from the Poetry Society of America; there have been three winners in three years of the Discovery/The Nation Award, and two winners of the National Poetry Series. In fiction, our students have also won the Whiting Award, along with an inordinate share of the nationwide Henfield Awards. A few years ago, our writers swept every major literary award in the country, with Ha Jin winning the National Book Award and the PEN/Faulkner, and Jhumpa Lahiri the PEN/Hemingway and the Pulitzer Prize. Not a year goes by without a graduate of our program bringing out a book with a major publisher; and some, like Sue Miller and Arthur Golden, spend a good deal of time on best-seller lists. Over the last decade we have placed more than a score of our graduates in tenure-track positions at major American universities. We make, of course, no such assurances. Our only promise to those who join us is of a fair amount of time in that river-view room, time shared with other writers in a common, most difficult pursuit: the perfection of one's craft. For more information about the program, visiting writers, and financial aid (our teaching fellows conduct undergraduate creative writing classes), write to Director, Creative Writing Program, Boston University, 236 Bay State Road, Boston, MA 02215 or visit our website at www.bu.edu/writing/.

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same ballet, differently attired. Nothing, it seems to me, could be further from the spirit of Ashton. At its best, his work reminds us of something that Keynes and de Valois knew well and Fonteyn exemplified: that "high" classical ballet can be a "people's art." Ashton used his idiosyncratic style to get under the skin of people's lives and fasten ballet to their highest hopes and deepest regrets.

If this legacy has been compromised at today's Royal Ballet, it has nonetheless found new life in other quarters. In the film *Billy Elliot*, Stephen Daldry weaves classical ballet into the story of the miners' strike of 1984, in which Thatcher nailed the coffin shut on the postwar consensus. In this unlikely setting, ballet becomes a metaphor for freedom, youthful ideals, and a more civilized world. Daldry's film is *The Red Shoes* of its time, and a huge public suc-

cess. A stage version recently opened as a blockbuster show on the West End.

Perhaps without meaning to, Daldry has thrown down the gauntlet. If he can tether classical ballet to some part of Britain's national life, what about the Royal Ballet? Do they have the artistic wherewithal to respond to the challenge, or will they continue blithely down the path of "heritage," moving further and further into balletic and cultural provincialism? If they choose heritage over art, London audiences may continue to be enthralled. But as Keynes would no doubt have reminded us, this is no measure of artistic merit. The Royal Ballet does need Ashton: he is their link to root and branch classicism and a distinct national idiom. And if they can find a way to use his legacy to make ballet really matter in today's Britain, they may yet have the world at their feet again. ■

Gordon S. Wood The Founders Rule!

THE FAILURE OF THE FOUNDING FATHERS: JEFFERSON, MARSHALL, AND THE RISE OF PRESIDENTIAL DEMOCRACY

By Bruce Ackerman

(Belknap Press/Harvard University Press, 384 pp., \$29.95)

ACADEMIC HISTORIANS ARE not much interested in constitutional history these days. Historians who write on America's constitutional past are a vanishing breed. For much of the academy, constitutional history, with its concentration on the actions of dead white males, is much too old-fashioned, and not to be compared in importance with cultural and social history, especially of the sort focusing on issues of race and gender. And so the teaching and the writing of constitutional history in American universities has been left almost exclusively to law school faculties. This is unfortunate. An understanding of our constitutional past would seem to be an integral part of a liberal-arts education, but few of our undergraduates have an opportunity to gain such an understanding. Having Congress mandate, as

it recently did, that universities receiving federal funds find a way every September 17 to celebrate something called "Constitution Day" will scarcely suffice.

Still, we do have all those law professors teaching and writing constitutional history. Some of them are increasingly well-trained historians, and their history is as good and as contextual as anyone could hope for. But there are also law professors who write what one wag has called "history lite"—law-office history that sees the writing of history as akin to the preparation of a legal brief. Whatever furthers the particular cause, or the particular case, is good history. And, in addition to these two categories of law professors working on constitutional history, there is Bruce Ackerman.

He is an unusual law professor. He thinks like a lawyer and a political scientist, but he strives to write good history. Sometimes we forget how good his history writing can be. Too often it gets lost amid his many other intellectual pyrotechnics. He is constantly firing off ideas for reforming this and that—everything from granting all young adults a citizen's stake of \$80,000 to establishing a system of secret donation

booths for campaign contributions. But at the same time he is in the middle of an impressive intellectual project titled *We the People*, consisting of three volumes, two of which have appeared. The first is titled *Foundations*, the second, *Transformations*, and the third, yet to be published, *Interpretations*.

In these volumes Ackerman aims to undermine the traditional narrative of lawyers by demonstrating that the Constitution is not just what the Founders in 1787 said it was. Americans, he contends, have had three great bursts of "constitutional politics" and "higher lawmaking" amid long periods of "normal politics." These transformative constitutional moments in the name of the people are the original founding of 1787, the reconstruction of the Union following the Civil War, and the Democrats' legitimizing of an activist national government during the New Deal. While the first moment created the Constitution, the last two fundamentally transformed it in ways that went way beyond the formal mechanisms of change prescribed in Article V of the Constitution.

ACKERMAN'S PROJECT IS interesting but controversial. Every constitutional scholar can agree that the Constitution we have today is very different from that of 1787, and also that the difference cannot be explained by the twenty-seven amendments that have been added to the original text. Yet many scholars, especially historians, would not agree with Ackerman that the major constitutional changes occurred only at his three extraordinary moments of transformation. Instead, they say, the changes have been ongoing, incremental, and often indeliberate. Indeed, ultimately they have made our Constitution as unwritten as that of Great Britain.

As a constitutional lawyer, concerned with using the past to find correct judicial interpretations of the Constitution, Ackerman cannot accept this historicized view that constitutional change has been continual and incremental throughout our past. Complex contextual history, with all its contingency and unpremeditated results, is not good for judges seeking historical authority for judicial decisions. Still, Ackerman aims to ground his

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constitutional thinking in sound history, even if he has to write it himself. In his new book, he does not want to cut loose from the authority of the Founding—its title is perhaps too provocative for its own good. He wants instead to give constitutional scholars and jurists more history to work with by expanding the dimensions of the Founding.

Ackerman knows only too well why we continue to write and to read books about the persons and events of two hundred years ago. "So long as the republic lives," he says, "the Founding is our fate. In our politics, in our law, in our deepest self-understandings as a nation, we are forever returning to consult its meaning." He admits that "there is a Sisyphean character to the enterprise—but that will never deter the effort, nor should it. Americans are right to suppose that decisions made long ago by Enlightenment revolutionaries continue to shape the range of our present opportunities—if only through a complex process of historical mediation over two centuries." But if the Founding is so important, especially to jurists, then it is crucial that we get it right and understand precisely what it was. He is right.

IN HIS NEW BOOK, ACKERMAN ADDS the election of 1800 and its aftermath to his earlier definition of the Founding, which included the making of the Constitution in 1787 and the Bill of Rights in 1791. He realizes that many constitutional scholars often include within the Founding the *Marbury v. Madison* decision of 1803, in which Chief Justice John Marshall set forth the idea of judicial review. But he believes that by focusing exclusively on *Marbury v. Madison*, we have misunderstood and overemphasized the significance of that case, and more generally have neglected the immense political and constitutional significance of the election of 1800. Once we grasp the importance of that contest, he argues, we will gain a better understanding not only of the Marshall Court in its early years, but also of the peculiar plebiscitary nature of the presidency. And we will also find out what incredible blunders the Founders really were.

As Ackerman nicely reminds us in the first section of his book, titled "The People's President," we have forgotten what a hairy moment the United States had during the election of 1800. The elec-

tion was very close and very partisan, with two parties, the Republicans and the Federalists, each putting up candidates for the presidency and the vice presidency. Jefferson and Aaron Burr for the Republicans and the sitting president, John Adams, and Charles Cotesworth Pinckney for the Federalists.

The Founders had not anticipated the rise of political parties: this, contends Ackerman, was their "original misunderstanding," and the source of much of the confusion in 1800. The Constitution provided that each elector in the electoral college could vote for two persons (one of whom had to be from a state other than the elector's home state), with the person receiving the majority of electoral votes becoming president and the person with the next most votes becoming vice president. But the emergence of political parties in the 1790s threw a monkey wrench into the intricate machinery of the electoral college. By 1800, both parties wanted to avoid the incongruous result of 1796, when the Federalist Adams became president with the Republican Jefferson as vice president. The way to do that was for the electors to identify themselves by party and vote for their respective candidates; but the Founders had blundered by not allowing the electors to designate who was to be president and who vice president.

As it turned out, the victorious Republican electors in 1800—who numbered seventy-three, a majority of the 138 total electoral voters—forgot to throw away one vote for Burr; and so both Jefferson and his running mate Burr each received seventy-three electoral votes. The Federalists were shrewder. They arranged for one elector to vote for John Jay instead of Pinckney; thus Adams received sixty-five electoral votes with his running mate Pinckney receiving sixty-four. At this time the Constitution declared that if more than one person received a plurality of the electoral votes and they were tied, then the House of Representatives, with each congressional delegation having only a single vote, would select the president who would be inaugurated on March 4, 1801.

To complicate matters further, the Congress making the decision was not the Republican-dominated body that had been elected in 1800, which would not come into being until December 1801. The Constitution had provided that the Congress would convene on "the first Monday in December" unless

it designated another day. The Congress elected in 1788 should have designated another day, presumably March 4, when both the old Congress expired and the president and vice president took office. But in what Ackerman calls another one of "the Founders' blunders," the first Congress back in 1790 had simply voted a third session in December 1790, even though the members of the first Congress would be lame ducks by then since the election for the new second Congress would already have occurred; and each subsequent new Congress had "mindlessly" carried on "this silly schedule" of beginning its first session more than a year after its members were elected, on "the first Monday in December," until the Twentieth Amendment in 1933 changed the schedule. This meant that the Congress elected in 1800 would not convene until December 1801, which in turn meant that the Congress making the decision in the election of 1800 would be the lame-duck Congress elected two years earlier in 1798. And that earlier election had resulted in an overwhelming victory for the Federalists, which meant that the Congress deciding who was president between the Republicans Jefferson and Burr was Federalist-dominated.

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STILL, THE CONSTITUTION stipulated that each state congressional delegation had only one vote, and so the Federalists' strength was not as great as it would have been if each congressman voted individually. The Federalist congressmen were concentrated in the North and thus controlled only six states; the more widely distributed Republicans controlled eight states, with two (Vermont and Maryland) split evenly between Federalists and the Republicans and unable to cast a ballot.

When the lame-duck Congress met on February 11, 1801 to count the electoral ballots, Vice President Thomas Jefferson was the president of the Senate, and, according to the Constitution, the officer in charge of opening the electoral certificates from each state. It turned out that the Georgia ballot of four votes for Jefferson and Burr was irregular. It could easily have been thrown out, in which case those four votes would have brought the total for Jefferson and Burr down to sixty-nine, one shy of the majority of seventy of the 138 total electors. The Constitution provided that if no candidates had a majority of electoral votes, then the House of Representatives could vote from among the top five candidates, not just the two who were tied with the most votes. If this had happened, the House would have had the ability to choose among the Federalist Adams, Pinckney, and John Jay, as well as the Republican Jefferson and Burr.

But Jefferson as president of the Senate simply counted the irregular Georgia ballot for himself and Burr, and no one challenged his decision. Ackerman makes a great deal of this incident, and concludes that it was the Founders' "bad mistake" in making the vice president the official in charge of opening the ballots. (Vice President Gore had to do the same thing in the disputed election of 2000 in which he was one of the candidates.) So the House had only Jefferson and Burr to choose from. But, as Ackerman is at pains to emphasize, the Federalist-dominated House had other alternatives. Since nine of the sixteen existing states were needed for Jefferson or Burr to be named president, and the Republicans controlled only eight of them, the Federalists were in a position to deny either candidate a majority. As the country confronted the prospect of no president being named by March 4, the Federalists might have passed a new statute naming someone like John Marshall as

interim president; or they might have stretched existing statutory authority to appoint the Federalist pro tem of the Senate as acting president. "Unforgivably," writes Ackerman, the framers of 1787 had neglected to say what would happen if the House failed to select a president by March 4.

The crisis seemed severe. After thirty-five ballots, the House was deadlocked. With eight states for Jefferson, six for Burr, and two not voting because of ties in their delegations, it looked to some as if anything might happen. As Jefferson informed Governor James Monroe of Virginia on February 15, 1801, the Republicans warned the Federalists that if they sought to place the presidency in the hands of some officer other than Jefferson or Burr, "the Middle States would arm, and that no such usurpation, even for a day, should be submitted to." As the sole congressman from Delaware, the Federalist James Bayard was in an influential position, since Jefferson needed only one more state to have a majority. Another mistake of the Founders was allowing "the fate of the presidency to hang on the identity of the sole representative of a tiny state."

Apparently Bayard approached Burr, but, according to the Delaware congressman, Burr "was determined not to shackle himself with federal principles." Yet Jefferson was prepared to deal, at least according to Bayard. Although Jefferson denied any deal, and the intermediary with whom Bayard dealt later said he was speaking only for himself and not Jefferson, Bayard believed he had assurances from Jefferson that he would preserve the Federalist financial program and refrain from dismissing lesser Federalist officeholders except for cause. Consequently, Bayard arranged for some of the Federalist congressmen to abstain from voting, and on February 17, on the thirty-sixth ballot, Jefferson was elected president.

ACKERMAN IS BOTH FASCINATED and bewildered by the marvelous way these American politicians in 1801 overcame the "maladroit legalisms" of the Constitution to bring the country through the crisis without violence and a civil war. As he points out, the Constitution was new and not yet iconic. "If hot-heads had had their way," he suggests,

the 1787 Constitution would have

disintegrated. American history would have moved in a Latin American direction. We would have seen military clashes, ending, most probably, with another constitutional convention, this time with Thomas Jefferson in the chair. Rather than proving an enduring feature of the American order, written constitutions would have begun to seem ephemeral things—with the Constitution of 1802 replacing the Constitution of 1787, which had only recently replaced America's first constitution: the Articles of Confederation of 1781.

This seems overwrought. Surely Ackerman is exaggerating when he remarks that "there is more than a whiff of the banana republic" in the story of the election of 1800. Given his lack of confidence in the Constitution, he needs to explain how these political leaders managed a peaceful transition of power in 1800, perhaps the first such peaceful transition of power between opposing parties in modern history. The secret, he says, was "a series of decisions by different statesmen [that] created a whole that was larger than the sum of its parts," but, he adds, "lots of luck was required as well." Yet "truth to tell," he accurately admits, "I don't think I've gotten to the bottom" of this problem.

EVEN THOUGH IT OCCURRED well before the election of 1800, the first statesman-like act of the American republic, in Ackerman's view, was President John Adams's courageous and lonely decision in 1799 to send another mission to France to head off war—a decision that led to the dissolving of the army that Alexander Hamilton and the other high-toned Federalists had planned on using to resist a French invasion. If this Federalist army had continued to exist, Ackerman suggests, it might have been used on the Federalists' behalf to resolve the presidential deadlock in 1801. As it turned out, Adams's action split the Federalist party, making it impossible not only for Adams to win the presidency but also for Hamilton and Adams to unite behind a coordinated strategy to deal with the tie vote in the electoral college.

But it was not just Adams's action that destroyed the Federalist army. Once word arrived in America of Admiral Nelson's smashing victory over the French

navy in the Battle of the Nile in October 1798, the threat of a French invasion quickly evaporated, and the Federalists suddenly lost their rationale for the army, which was largely on paper anyhow. Adams's decision to send a peace mission was certainly courageous, but it contributed to ending the crisis of 1798–1799, not the crisis of 1801. Indeed, if Adams had not sent his mission to France, he very well may have been elected president in 1800.

SO ADAMS'S CONTRIBUTION to the peaceful transition of power in 1801 may not have been as crucial as Ackerman suggests. But what about the other statesmen who Ackerman thinks made the peaceful transition possible? Bayard, he says, is one, and that makes sense; but Burr is another, and that does not make sense. Ackerman believes that "Burr has gotten a bum rap" from history. By refusing to make a deal with the Federalists in order to become president, Burr "saved the republic from a violent lurch in the Latin American direction." Ackerman reckons that Burr's "restraint" was "the second most important single factor in accounting for the peaceful transition of power" after Adams's actions. But this suggestion that Burr "displayed a good deal of statesmanship" during the deadlock is not very credible. Far from easing the crisis, Burr's behavior in 1800–1801 contributed to it. Everyone knew that the Republicans meant Jefferson to be president and Burr vice president. If Burr wanted to be a statesman, all he had to do was declare that under no circumstances would he accept the presidency.

Finally, Ackerman says, Jefferson "played his strategic cards well." He hid from the public any "obvious signs of military coup or corrupt bargain. As far as the broader public could see, the House of Representatives had, after strenuous deliberation, selected the People's choice as president through constitutional means." But Jefferson's election hardly satisfied the Republicans, who believed quite rightly that the defeated Federalists in the eleventh hour had taken over the courts as a means of thwarting the results of the popular election. In the second section of his book, titled "The People and the Court," Ackerman details the monumental struggle Jefferson and his fellow Republicans had with the federal judiciary.

The lame-duck Congress that decided the presidency was also capable of enacting legislation. In February 1801, this Federalist Congress hurriedly passed a judiciary act that radically altered the federal judicial system. The act eliminated circuit court duty for the justices of the Supreme Court by creating six new circuit courts with sixteen new judges. It broadened the original jurisdiction of the circuit courts, especially in cases involving land titles, and provided for the easier removal of litigation from state to federal courts. It also recognized that the common law of crimes ran in the federal courts—that is, that federal judges could invoke the common law in addition to federal statutes in criminal cases. This, above all, frightened the Republicans, because, as Madison declared, with the "vast and multifarious" body of the common law at their disposal, the federal courts might, "new model ... the whole political fabric of the country." To add insult to injury, John Adams, before surrendering the presidency to a Republican president, appointed a number of Federalist judges to this newly enlarged federal judiciary, including John Marshall as chief justice of the United States. All this by a legislature and a president that did not represent the popular will.

What a mess, says Ackerman; and it was all the fault of James Madison, who presumably should have anticipated the future and in 1787 eliminated all these glitches in the Constitution. It was not Adams "but Madison who had contributed to a document that allowed presidential elections to end in constitutional crises; it was not he, but Madison, who had made it possible for the losers in national elections to wield legislative and executive power in such an irresponsible fashion."

JEFFERSON AND THE OTHER REPUBLICANS were furious at this egregious Federalist behavior. Jefferson dreaded what Adams and the Federalists were doing because he realized that the Federalist appointments to the judiciary were "in the nature of freehold," which rendered "it difficult to undo what is done." But the Republican Congress that convened in December 1801 was determined to undo what was done, and after a long and bitter debate the Republicans in 1802 repealed the Federalist judiciary act, thus at a stroke destroying the newly created circuit

courts and for the first and only time in American history revoking the tenure of federal judges as well.

Since federal judges could not have their salaries diminished during their continuance in office, most of the Federalists thought that this Republican repeal of the judiciary act of 1801 was unconstitutional; and they urged Marshall as head of the Supreme Court to declare it so. But Marshall decided to duck this issue and, recusing himself, reluctantly pressed his Court in *Stuart v. Laird* in 1803 to accept the constitutionality of the Republicans' repeal of the judiciary act of 1801. Instead of confronting the Republicans directly, he decided to assert the Court's authority indirectly in *Marbury v. Madison*.

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William Marbury was one of the “midnight judges” appointed at the last minute by President Adams to be a justice of the peace for the District of Columbia. Adams left office before Marbury’s commission could be delivered, and Jefferson, when he became president, refused to deliver it. Marbury brought suit in the Supreme Court, seeking a writ of mandamus commanding Secretary of State Madison to deliver his commission. It looked to many that the Court might openly challenge the authority of the president. Yet the Marshall Court could only lose a direct contest with the president: if the Court refused to order Jefferson to deliver the commission, the Republicans would win by default, but if the Court did order the president to do so and he refused, the Court would be humiliated. Thus the Court had to move in a roundabout way to assert its authority.

The Court’s opinion set forth in 1803 answered several key questions. Was Marbury entitled to his commission? And if so, did the law afford him a remedy? Yes, answered Marshall to both questions. Marbury had a vested right in the office for the term fixed by statute, and the law had to provide a remedy for a violation of a vested legal right. A collision with President Jefferson seemed imminent, but when Marshall asked and answered his third question he wisely evaded it. Was the remedy for this violation of Marbury’s right a writ of mandamus issued by the Supreme Court? No, said Marshall. The Supreme Court could not issue such writs because Section 13 of the original judiciary act of 1789, which authorized the power to issue writs was unconstitutional: Congress did not have the authority to alter the original jurisdiction of the Supreme Court contained in Section III of the Constitution. By posing the questions in this unusual order, Marshall was able to make his point that the Court had the authority to declare acts of Congress unconstitutional without having to suffer the consequences of it. As Jefferson and other Republicans complained, the Court, in its final question, disclaimed all cognizance of the case, but in the first two questions declared what its opinion would have been if it had been cognizant of it.

Ackerman quite rightly argues that the *Stuart* decision, which upheld the constitutionality of the Republicans’ repeal of the Federalists’ judiciary act of

1801, was far more important at the time than the *Marbury* decision, and that the two cases should be seen together. *Marbury* had “no real-world effect” in 1803; indeed, most Republicans said that if Marshall wished to reduce the jurisdiction of his Court, so be it. But *Stuart* actually legitimated the new constitutional order that the Republican victory created. (Ackerman is one of many scholars who believe that *Marbury* gained its modern significance only in the late nineteenth century.)

Ackerman considers Marshall’s behavior throughout the whole business to have been outrageous. Not only does he accuse Marshall of promoting himself as the person to become interim president in 1801, but he also charges him with the grossest sort of judicial misbehavior. Marshall continued to act as Adams’s secretary of state after being appointed chief justice, but worse, he “blundered forward” in “ridiculous” circumstances and refused to recuse himself from the *Marbury* case even though it was he who, as secretary of state, had failed to deliver Marbury his commission as justice of the peace; and then he assigned himself the opinion “so that he might better flaunt his involvement in the face of his Jeffersonian opponents,” Ackerman writes. “If there is another case in the annals of the Supreme Court that reveals such grotesque forms of judicial impropriety,” says Ackerman, “I have yet to come across it.”

Although Ackerman admits that Marshall adopted a conciliatory strategy in order to save the Court from the Republicans, he does not evince sufficient sympathy for Marshall or his strategy. Ackerman concedes that the situation was serious. Many Republicans were bent on diminishing the role of the courts; some wanted to make judges removable by a joint address of the majority of the Congress, while others wanted to do away with the federal courts altogether. The Republican-dominated House’s impeachment of Associate Justice Samuel Chase in 1804–1805 was presumably the first step in cleaning out the Court. Many thought that Marshall would be next. In the end it was the concern of six Republican senators to maintain the independence of the judiciary that prevented Chase’s conviction, but Marshall’s accommodating behavior was crucial throughout.

From the beginning of his tenure as chief justice, Marshall had sought to save

the Court’s existence in a hostile Republican climate; and these efforts are not fairly or fully described by Ackerman. Marshall began by changing the high-toned image of the Court. Under the Federalists, the justices had tended to wear either individual academic gowns or robes of scarlet and ermine in imitation of the king’s bench of England—dress that one Republican senator described as the “party-colored robes” of an oppressive judiciary. Instead, Marshall induced his colleagues into wearing the plain black republican-style robes that the Virginia judge used. And this symbolic rejection of monarchism was only the first step in Marshall’s efforts to escape from the partisan politics of the 1790s. He strenuously sought to reach some sort of accommodation with the other branches of the government, and in the years before the War of 1812 he tried to avoid any direct confrontation with the Republicans. All of his evasion and his caution, as he later told Justice Joseph Story, was based on a quite sensible fear that the justices might be “condemned as a pack of consolidating aristocrats.”

The *Stuart* decision to legitimate the Republicans’ repeal of the Federalist judiciary act of 1801 was the most obvious act of accommodation, and Ackerman correctly emphasizes its importance. But equally important in pulling in the exposed Federalist horns was Marshall’s rejection of the prevailing Federalist claim that the common law of crimes ran in the federal court system. Although this rejection was not formally endorsed by the Supreme Court until the decision of *United States v. Hudson and Goodwin* in 1812, Marshall had suggested as early as 1800 that the English common law was no part of American law, and had blamed the currency of “this strange & absurd doctrine” on “some frothy newspaper publications.” Indeed, in the period up to 1812 his Court whittled away at the Federalist claim. Although Ackerman mentions the decision in *United States v. Hudson and Goodwin*, he wrongly interprets it as a defeat for Marshall and presents no context for the Court’s statement in 1812 that the issue had been “long settled in public opinion.”

Marshall was a shrewd politician, and he knew what had to be done to save the courts. In a series of decisions, the Marshall Court asserted the authority of the president and the Congress over foreign affairs and matters of war and retreated

from the advanced positions the Federalists had tried to establish for the judiciary and federal law in the 1790s. In the trial of Aaron Burr in 1807, Marshall rejected the broad definition of treason the Federalists had used in the 1790s during the Whiskey and Fries rebellions, and instead interpreted the Constitution's definition of treason very strictly and narrowly.

THERE IS A LOT TO BE SAID for Ackerman's revisionist account of the early Marshall Court, especially in his emphasis on the significance of the *Stuart* decision. But when he declares that "by 1812 Marshall had lost control of his Court," he goes too far. It is true that by 1810 there were more Republicans than Federalists on the Court, but Marshall's amiable dominance continued. His convivial and robust personality, and his instinct for compromise, helped him to maintain his extraordinary influence. His practice of having the Court speak with one voice (usually his) built consensus and enhanced the authority of the institution. Although Ackerman concedes that the Marshall Court wove popular mandates into America's constitutional order, he does not do justice to Marshall's achievement.

Ultimately, Ackerman is less interested in the story of the Court and judicial review than he is in the rise of new forms of popular sovereignty in 1800. And on this point he has made a substantial contribution to our understanding of the early Republic. His account helps to make sense of the conflict between the Federalists' aristocratic and legalistic approach to politics and the Republicans' modern belief in having a mandate to carry out the will of the people. Jefferson's election as president in 1801, he says, marked "the birth-agony of the plebiscitarian presidency: for the first time in American history, a president ascended to the office on the basis of a mandate from the People for sweeping transformation." But the Constitution of 1787 was not designed for such a plebiscitarian presidency, nor was it compatible with the development of parties. In fact, not only were the Founders opposed to parties, they struggled to prevent their development. It was the unanticipated emergence of political parties that created most of the difficulties with the electoral system that Ackerman dwells upon.

Ackerman understands that parties were the source of most of the problems, but he cannot help anachronistically criticizing the Founders for their many failures. His overemphasis on the Founders' blunders and mistakes, reflected in his hyperbolic title, skews his account and diminishes the significance of his often well-crafted historical scholarship.

Ackerman sees his book as "a cautionary tale," a warning to us that we have no substantial means of controlling the plebiscitarian presidency. Certainly worshipping "at the shrine of the Philadelphia Convention" will not help us. Not only did the Founders offer no answer to the problems of presidents' claiming popular mandates, but in 1801 they evaded re-thinking the issue of presidential selection (as we did in 2000). Consequently, he concludes that "we have never recovered from the early Republic's failure to undertake a thoroughgoing redesign of the presidential selection."

ACKERMAN IS TOO PREOCCUPIED with the letter of the Constitution and so he misses its spirit. He considers the Constitution to be a "technical mess" that still plagues us: the document, in his view, should have been longer and more de-

tailed. He believes the Founders should have anticipated many of the technical problems that arose in the following decades, and drafted the Constitution better. He implies that it was mainly a few serendipitous acts of statesmanship and "dumb luck" that kept the new nation from going the way of nineteenth-century Mexico or France, with constitutions following one upon another and no constitutional equilibrium established.

All this is not persuasive. The American leaders in 1801 were not Mexicans or Frenchmen, all of whom at the time had little or no experience with self-government. For the most part, the American leaders were former Britons with an acute sense of the English conceptions of law, liberty, and rights, and with a century or more of experience with elections and self-government. That heritage made all the difference. *They* were what got the United States through the crisis of 1801 and kept it from becoming another banana republic. No written constitution, even a long one with all the technical problems foreseen, can establish order and guarantee good government. Order and good government come from the experience and the common sense of the people, not from some cleverly crafted legal document. ■

CORRESPONDENCE

continued from page 4

The idea of being overdue for a new pandemic led to the mass vaccination of over 40 million people during the swine flu scare of 1976. There was no pandemic, but at least 25 people died from the vaccine. Thirty-seven years after the pandemic of 1968, Dr. Edwin Kilbourne, who argued for periodicity and led the drive for swine flu vaccination, insists that the idea of periodicity is dead. There is now no logical reason to believe in it.

Lipsitch and Bergstrom claim that "an unprecedented combination of traits" make H5N1 a "prime candidate" for the next pandemic. But, as USDA poultry-flu expert David Swayne points out, no known pandemic has been caused by highly pathogenic avian flu. Over the past two years, H5N1 has spread in birds across Asia; why have only 62 people died of bird flu? Why haven't there been, at most, more than a few instances of probable person-to-person transmission? Why is there such a low rate of subclinical infection among health workers car-

ing for H5N1 patients—unlike SARS, where most cases spread in hospitals? Lipsitch and Bergstrom do not say.

The writers attack Ewald's explanation for the exceptional virulence of the 1918 flu as a "fringe" argument. They cite a 2003 article that says there is "little theoretical justification and no empirical evidence" for Ewald's argument. But its authors get that argument wrong. Ewald uses Darwinian logic to argue that the Western Front allowed the repeated infection of new hosts by people *immobilized by illness*. The precise conditions of the Front, the hospitals, trucks, trains, and trenches packed deathly ill soldiers shoulder to shoulder with the well. Normal flu depends on host mobility: It can't knock its host down, or it won't spread. But, in the trenches, those brakes to virulence were off, and lethal flu evolved. The study's authors think Ewald is talking about ordinary *crowding*: They announce that Ewald is wrong and crowding won't boost flu virulence. Of course it won't. That was never Ewald's argument—though Lipsitch and Bergstrom appear not to realize that. ■

NEW YORK DIARIST

Strength in Swing

IMMEDIATELY FOLLOWING THE landing of Hurricane Katrina, I received hundreds of phone calls from all over the world. They offered sympathy and resources. I don't get those phone calls now. The ones I receive now are rife with disgust at bureaucratic fumbling, with rage at an unspecified *they* who are in charge of everything from predicting which levees would break to choosing which people will return. *They* made it happen. *They* were responsible. In this case, *they* means Mayor Nagin, Governor Blanco, Secretary Chertoff, and President Bush. But this ongoing tragedy is of such magnitude that a *they* big enough to have had that much control has yet to be found. It is fruitless to demonize those who may be to blame, to pretend that, if the almighty *they* had only done their jobs, then this intolerable level of destruction would not have happened. In the case of New Orleans, it was also *we* who watched as money to fix the levees was removed from the federal budget, in spite of the warnings of dire consequences from the U.S. Army Corps of Engineers; *we* who ignored the local and national press, which predicted doomsday; *we* who settled for Category Three—worthy defenses to save us from a Category Four or Five attack; *we* who were complacent about New Orleans and about Washington.

AS WE LOOK AT WHAT HAPPENED IN THE Crescent City, we are brought closer to this simple truth: The ingredients for social disaster are present in cities all over the United States. You see, we are too busy to worry about poverty, public education, homelessness, drug addiction, the arts, even the political process. "I'm too busy to follow what goes on in Congress." "Don't they have organizations for these types of things?" "I gave to them last year." "Oh, I'm sure that they will take care of it." I believe the United States will help to rebuild New Orleans, because New Orleans helped to build the United States; but the way we rebuild it can show the world that American greatness is more than stock markets and military might. I know that we are capable of

building more than malls and theme parks, of acting like a community. I know this from the art of jazz.

JAZZ CAME OUT OF NEW ORLEANS IN the 1910s, and defined an age in the 1920s, and became the pop music of America in the 1930s. In the 1960s, the rest of the country started to catch up to jazz's old message of equality. Jazz has always been concerned with who we are as Americans, from the projects to the penthouses. Now, we are an impatient nation; we demand quick solutions. If we can't fix the problem, then we fix the surface and move on. (Too busy to learn to sing? Then lip-synch it. No time for the gym? Get a plastic surgeon.) Many of us are ready for the Katrina story to be over, when it is just beginning. So, if we are to hold on to our best intentions, I suggest that we recover the wisdom in the jazz principle of swing.

SWING IS A PHILOSOPHY OF STEADFASTNESS. It instructs us to maintain an equilibrium when external forces are conspiring to tear it apart. At the heart of swing, two extremely different instruments—the drum and the bass—must be played with absolutely the same intentions. The cymbal that is struck on every beat by the drummer is in the high high register, and the bass notes, also articulated on every beat, are in the way way low. In order to swing, these extremes must get together, and then they must stay together. If you think getting together is hard, then you probably know that staying together is practically impossible. Anyone can swing for a few measures—but swinging is a matter of endurance. It tests the limits of your ability to work with another person to create a mutual feeling.

THAT IS WHAT IS REQUIRED OF THE CITIZENS of this country now: sustained engagement with the issues that have been raised by this tragedy. There are cultural issues (in the history of New Orleans lies much of the originality of American culture, but what investment is our nation making in the arts, in cultivating our understanding of who we are?); issues of government incompetence (every day

we suffer listlessly some human slight at the hands of a bureaucratic machine that has lost touch with the people it was designed to serve); and the issue of race, perhaps the most explosive issue in American life. Class is a profound problem, of course, but race gives class a particular pungency in America. The race issue has always been used to polarize the lower classes. Many of the calls I receive from New Orleanians decry an increase in racism. Friends of mine from high school tell me that they have never seen such vitriol, and these are white comrades talking about their friends and family, not victims of the rap game. But New Orleans, for all its racial problems, used to represent, even poetically, the putting together of black and white identities. The city became famous for its combination of elegance (the French Opera House, fine clothes, masked balls, high-class architecture, and great food) and a free-spirited wildness (duels, prostitution, corrupt politics, gambling, vice, and fun). Elegance and abandon for the rich, and much more freedom for the poor. Slaves had the right to play their own music, and to sell their creations, and even to attend shows at the French Opera House. The combination of these seemingly opposed forces, when met with freedom, is what gives life much of its sweetness. (The blues is a sad song with a happy groove.) When stricter segregation laws defined Creoles as blacks, the quality of jazz was enhanced, because Creole and black musicians were forced to acknowledge each other's skills.

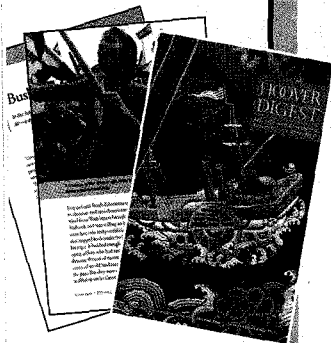
NOW, THROUGH THE DISPLACEMENT OF 300,000 families, we are forced as a nation literally to come closer and deal with one another in an unprecedented way. The development of jazz showed what Americans can do when we come together. There is no greatness without discomfort. Will we now recognize that we are on this land together? Have we given up on the proposition that every generation of Americans will improve on the glories of the one before? Why are systems now failing to help the people they should help? We must not acquiesce in incompetence or bigotry or greed. In New Orleans, we have real big roaches, and we have a saying: "When you turn the lights on, the roaches scatter." We must keep the lights on.

WYNTON MARSALIS

Wynton Marsalis is the artistic director of Jazz at Lincoln Center.

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Liberty First, Democracy Later

The best way to promote democracy abroad? Promote liberty first.

By Peter Berkowitz.

By its very name, democracy indicates not merely an ethos or a set of procedures but rather a distinctive form of government. In contrast, liberty names a good that can be achieved gradually, one reform at a time, in a variety of regimes. . . . Whatever is in our minds when we utter the phrases, democracy promotion proclaims a radical cure—regime change—whereas spreading liberty suggests incremental reform.

Over the long haul, the best way to make democracy stable and just is to practice toleration, establish an independent judiciary, encourage a free press, and build a market economy—hallmark liberal institutions all. At the same time, the experience of the last 250 years demonstrates that the best way to secure individual rights is to make government accountable to the people by grounding it in a regular cycle of free and fair elections. And liberty and democracy intertwine in the idea that participating in the choice of government officials is itself an important expression of individual freedom. At the same time, it is useful to keep in mind that instituting majority rule and expanding individual rights are separable undertakings.

Concentrating on liberty involves a shift of rhetoric and a change of emphasis in practice. In our efforts to promote liberty, particularly in the wider Middle East, we should utilize the array of diplomatic and developmental means at our disposal to expand the range of individual rights, particularly liberty of thought and discussion; extend the rule of law; foster religious toleration; and ensure equality of opportunity for women in politics and in the marketplace. Proponents of democracy promotion should not be disappointed or alarmed. One advantage to putting the spread of liberty abroad first in the here and now is the long-term gains it promises in promoting democracy around the globe.

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- *Established the King Abdulaziz Center for National Dialogue to bring together leading personalities to publicly discuss important issues facing Saudi Arabia*
- *Established the National Human Rights Association with a mandate to implement international human rights charters*
- *Enacted the Saudi Arabian Capital Markets Law, setting up the Saudi Arabian Securities and Exchange Commission to protect investor interests; and formalizing the Saudi Arabian Stock Exchange, which is today the largest emerging market*
- *Established the Foreign Investment Law to encourage direct foreign investment*

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